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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1941.

No. 844

BAKERY SALES DRIVERS LOCAL UNION NO. 344 (A. F. of L.), AUTO TRUCK DRIVERS JOINT COUNCIL NO. 50 (A. F. of L.), ELMER JOHNSON, JOSEPH REICHARTZ, GILBERT SCHLECHTA and G. McMICKEN,

Petitioners,

vs.

CARPENTER BAKING COMPANY, a Corporation,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WISCONSIN

and

BRIEF IN SUPPORT THEREOF.

JOSEPH A. PADWAY and
A. G. GOLDBERG,
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ST. LOUIS LAW PRINTING CO., 415 North Eighth Street. CEntral 4477.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1941.

No. .....

BAKERY SALES DRIVERS LOCAL UNION NO. 344 (A. F. of L.), AUTO TRUCK DRIVERS JOINT COUNCIL NO. 50 (A. F. of L.), ELMER JOHNSON, JOSEPH REICHARTZ, GILBERT SCHLECHTA and G. McMICKEN,

Petitioners,

vs.

CARPENTER BAKING COMPANY, a Corporation,

Respondent.

PETITION FOR WRIT OF CERTIORARI.

To the Honorable the Justices of the Supreme Court of the United States:

The above named petitioners respectfully petition for a writ of certiorari to review a decision of the Supreme Court of the State of Wisconsin, 238 Wis. 367, 299 N. W. 30, rendered June 25, 1941, motion for rehearing denied October 7, 1941 (300 N. W. 225), affirming a judgment of the Circuit Court for Milwaukee County, Wisconsin, enjoining and restraining your petitioners from engaging in certain activities. (The principal decision and the decision on rehearing are set forth as Appendix A of petitioners' brief, attached to this petition at page 59).

SUMMARY STATEMENT OF MATTER INVOLVED.

[References to the record are references to the pages of the printed case, filed in lieu of the record under rule 38(7) of the United States Supreme Court.]

Bakery Sales Drivers Local Union No. 344 (A. F. of L.) and Auto Truck Drivers Joint Council No. 50 (A. F. of L.) are voluntary unincorporated associations, known as labor unions. The individually named petitioners are members and officers of the aforesaid organizations (R. 25).

The Carpenter Baking Company is a corporation organized and existing under and by virtue of the laws of the State of Delaware, duly licensed to transact business in the State of Wisconsin, and is engaged in the manufacture, sale and distribution of bread and other bakery products in the City of Milwaukee, Wisconsin (R. 24).

Bakery Sales Drivers Local Union No. 344 (hereinafter called the union) had attempted to organize the bakery sales drivers of the Carpenter Baking Company (hereinafter called the company) since 1933 (R. 35).

In November, 1934, the organization had secured all-union agreements with two of the major bakeries in the Milwaukee area, and by 1938 had such agreements with all major bakeries with the exception of the Carpenter Baking Company. These agreements corrected such evils as Sunday work, work from early morning until late afternoon, no vacations with pay, and no guaranteed or base wage, and conferred other benefits as well (R. 51, 52).

In 1934 the bakery sales drivers of the Carpenter Baking Company organized a so-called union known as Brotherhood of Bakery Sales Drivers Local No. 1 (hereinafter called the Independent), all of the employees becoming members of such organization. In 1936 a check-off system was arranged between the Independent and the

company whereby a dollar per month was deducted from the wage of the employees and paid to the treasurer of the Independent (R. 35).

In 1938 the Independent and the Carpenter Company entered into a labor agreement for the year 1938, expiring on December 31, 1938, covering hours, wages and working conditions. During the year 1940 there was no contract of any kind existing between the Independent and the company (R. 36).

From 1938 on many meetings were held between representatives of the company and representatives of the petitioning unions in an effort to agree upon the terms of a contract (R. 36-40). A contract submitted at that time contained an all-union agreement, which was valid under the then existing laws. (**United Shoe Workers etc. v. Wisconsin Labor Relations Board**, 227 Wis. 569, 279 N. W. 37; **American Furniture Co. v. I. B. of T. C. S. & H.** [Wis.], 222 Wis. 338, 268 N. W. 250.) Upon the refusal of the company to sign such agreement, and after due notice to the company, as requested by its officials, the union, Local 344, in January, 1939, placed pickets at the plant (R. 40).

These activities were temporarily suspended for several days while the Wisconsin State Labor Board sought to conciliate the matter, but were resumed after the employees of the Carpenter Company voted against affiliation with Local 344 (R. 40, 41).

On January 23, 1939, the company ceased operations, and did not resume such operations until after the passage of Chapter 25, Laws of 1939, limiting the definition of labor dispute to disputes between an employer and a majority of his employees. The company paid the wages of the employees during this period of the shutdown (R. 41).

In June, 1939, the unions filed charges with the National Labor Relations Board against the Carpenter Baking Com-

pany, alleging violation of the National Labor Relations Act. The Trial Examiner appointed by the Board to take testimony upon the complaint issued by the Board filed an intermediate report on August 17, 1940, finding that the company had engaged in unfair labor practices under the National Act (R. 43).

From April 4, 1939, until August 12, 1940, Local 344 continued its efforts to unionize the bakery sales drivers by the individual solicitation of such sales drivers on numerous occasions. At least two meetings were called by Local 344, which were attended by some of the sales drivers employed by the company (R. 43).

At a regular meeting held on April 9, 1940, Local 344 granted to the executive board of the union the authority to advertise the nonunion status of the Carpenter sales drivers (R. 45, 46). At a special meeting held on July 23, 1940, the members voted to pay an additional dollar per month as dues "during the controversy with the M. Carpenter Baking Company sales drivers" (R. 46).

On August 12, 1940, Local 344 commenced the following activities:

The delivery trucks of the company were followed by automobiles driven by members of Local 344, accompanied by another man wearing a canvas apron suspended from the shoulders and visible from both the front and the rear, containing the following words:

> "This Carpenter Baking Co. employe is not a member of Bakery Sales Drivers Union Local 344. Please do not patronize."

The bakery truck was followed from one customer's place to another. As the truck would stop to make a delivery the union representative wearing the sign walked back and forth alongside the truck. In those cases where the truck was not parked immediately in front of the

customer's place of business the sign bearer walked to the front of such place of business while the Carpenter Baking Company employee was inside (R. 46, 47).

The other union representative entered the place of business and informed the proprietor or manager that the Carpenter sales driver was not a member of Local 344, and requested such person to co-operate with the union, either by refusing to purchase or by limiting the purchase of bakery goods offered for sale by the Carpenter Baking Company employees (R. 47). Sales drivers are paid in part on a commission basis (R. 53).

After the commencement of the picketing activities the Carpenter Baking Company supplied an additional man to accompany each sales driver who was followed by a union representative, such helper remaining in the truck while the sales driver made the delivery (R. 47).

The number of automobiles engaged in such activities on behalf of the union varied from two to six, but only one auto followed each truck (R. 48).

There has been no violence since the commencement of the activities on August 12, 1940 (R. 53).

At the time of the commencement of the action eight employees of the Carpenter Baking Company were members of Local 344 (R. 73).

The union members engaging in the picketing activities have been instructed to be courteous at all times, never to follow the trucks too closely, and to obey all traffic signals (R. 60, 65, 86). When following a truck the automobile would either park across the street, or if there was sufficient room would park in front or behind the Carpenter truck (R. 60, 61).

Statements were made to the public only in response to questions asked of the person carrying the sign, and in

those cases the only statement made was that the particular employee was not a member of the union (R. 61, 64, 65).

While the union would like to secure an all-union agreement from the Carpenter Baking Company, the immediate objective of the union, in view of the present state labor laws, is to secure the required three-fourths approval of the employees as is provided by law [111.06 (c), Wis. Stats. 1939] prior to asking for such agreement (R. 69), and to secure patronage for union men (R. 71, 72). No members of the union employed by the company were followed or picketed (R. 72).

PROCEEDINGS IN THE CIRCUIT COURT FOR MILWAUKEE COUNTY.

On the 15th day of August, 1940, the company brought an action in equity in the Circuit Court for Milwaukee County, seeking temporary and permanent relief restraining the petitioners from following and picketing the company's employees and delivery trucks, from inciting and persuading persons not to deal with the company or with retail dealers offering the company's products for sale, and from in any way representing that there was a labor dispute existing between the company and the employees, or otherwise molesting or interfering with the plaintiff in its business (R. 12, 13).

The complaint alleged that the employees of the company engaged in the sale and delivery of the company's bakery products have refused to designate the union as their collective bargaining representative, and that no labor dispute existed between the company and its employees, but that such relationship between the company and its employees had been harmonious at all times (R. 3, 4).

It was further alleged that the unions had entered into

a conspiracy, contrary to the provisions of Section 343.681 of the Wisconsin Statutes, to injure the company's trade and business for the purpose of compelling the company to influence, coerce and force its said employees to designate the unions as their collective bargaining representative, and for the purpose of willfully and maliciously injuring the company in its trade and business, and that in furtherance of such conspiracy the unions have sought to intimidate the company's employees and have engaged in a secondary boycott within the meaning of Section 111.02 (12) of the Statutes (R. 4, 5).

It was further alleged that the specific acts committed in furtherance of the conspiracy consisted of following the delivery trucks of the company, seeking to persuade the company's customers to discontinue purchasing the bakery products from the company, falsely intimating that there was labor trouble at the company's plant, and picketing the company's trucks and its customers, accompanied by the carrying of signs stating that the Carpenter Baking Company employee was not a member of the Bakery Sales Drivers' Union No. 344 (R. 4, 5, 6).

The petitioners in their answer alleged that the company, in its relationships and dealings with the employees of the company, has engaged in conduct which was in violation of the National Labor Relations Act, and had so been found guilty by an intermediate report of an agent of said Board, rendered after public hearing before such Board (R. 10, 11).

It was asserted that the conduct engaged in by the unions consisted of peaceful and truthful advertisment of the fact that the company's employees were not members of Bakery Sales Drivers' Union No. 344 (R. 14).

It was further alleged that in so far as any purported violations of Sections 111, 103.535 and 103.62 (3) were con-

cerned, such statutes were unconstitutional and void and violative of the Constitutions of the State of Wisconsin and the United States; that by virtue of the fact that the employer was engaged in interstate commerce, Chapters 111 and 103 of the Wisconsin Statutes were not applicable; and, finally, that the company did not come into a court of equity with clean hands, and, therefore, was not entitled to any relief (R. 14, 15).

After the trial of the case, which consisted cheifly of stipulation of certain undisputed facts, as above set forth, the trial court rendered its decision, in which it was held that the conduct of the unions was in violation of Section 111.06 (2), (a), (b) (e) and (f). Particular emphasis was placed upon the provisions of Section 111.06 (2) (e), and the construction of that section by the Supreme Court of the State of Wisconsin in the **Hotel & Restaurant Employees'** case (236 Wis. 329, 294 N. W. 632) (R. 20-23).

The Court further held that equitable jurisdiction of the Court may be immediately invoked, because there was no "labor dispute" between the parties as that term was defined in the statutes (R. 23).

The findings of fact filed by the Court related to claimed violations of the provisions of Section 111.06 of the Statutes, particularly Section 111.06 (2) (e), and the Court found as conclusions of law that the conduct of the unions constituted unfair labor practices as defined by Section 111.06 of the Statutes; that no labor dispute existed between the company and the unions as defined in Section 111.04 [the Court undoubtedly meant Section 111.02 (8) of the Statutes]; and that the provisions of Chapter 111 of the Statutes were ~~held~~ valid and constitutional enactments (R. 75, 80).

Judgment was entered accordingly, and provided as follows:

"It Is Hereby Adjudged and Decreed that the defendants, and each of them, their officers, agents, servants and employes, be and they are hereby enjoined and restrained:

"(1) From adopting means and engaging in conduct intended and reasonably calculated to coerce and intimidate plaintiff's employes while performing their usual and ordinary services for the plaintiff.

"(2) From following plaintiff's employes and delivery trucks while said trucks are being used to deliver bakery products to the plaintiff's customers.

"(3) From inciting or attempting to persuade persons not to deal with the plaintiff or the plaintiff's employes or with retail dealers offering plaintiff's products for sale.

"(4) From otherwise intentionally molesting, injuring or interfering with the plaintiff in its business" (R. 32, 33).

From this judgment the union appealed to the Wisconsin Supreme Court, which affirmed the judgment and denied a motion for rehearing.

STATEMENT AS TO JURISDICTION.

This case is one over which the Court has jurisdiction under the provisions of the Act of Congress of February 13, 1935, Section 237-b, 28 U. S. C. A., Section 344-b, giving jurisdiction to this Court:

"to require that there be certified to it for review and determination with the same power and authority and with like effect as if brought up by appeal any cause wherein a final judgment or decree has been rendered and passed by the highest court of a state in which a decision could be had where is drawn in question the validity of a treaty or statute of the United States; or where is drawn in question the validity of a statute of any state on the ground of being repugnant to the Constitution or laws of the United States; or

where any title, right, privilege or immunity is specially set up or claimed by either party under the Constitution * * *."

This case is one in which the validity of the Statutes of the State of Wisconsin, to wit, Sections 111.01 through 111.19, Wisconsin Statutes 1939, particularly Sections 111.06 (2) (e) and 111.02 (8), and a judgment based thereon, is drawn in question upon the ground that such statutes and judgment are repugnant to Section 1 of the Fourteenth Amendment to the Constitution of the United States, as depriving petitioners of liberty or property without due process of law, denying to the petitioners the equal protection of the laws and, more particularly, denying to the petitioners freedom of speech.

The decision of the Wisconsin Supreme Court was in favor of the validity of the statutes and the judgment.

This is also a case wherein the petitioners have especially set up and claimed rights, privileges and immunities under the Constitution of the United States, and such claim has been denied.

Said Supreme Court of the State of Wisconsin rendered its decision herein June 25, 1941, and in a second opinion, rendered on October 7, 1941, said Supreme Court denied a rehearing. Said opinion of the Supreme Court of the State of Wisconsin, the last resort in all causes in the State of Wisconsin, is officially reported in 238 Wis. 367.

Your petitioners argued before the Circuit Court for Milwaukee County and before the Supreme Court of the State of Wisconsin that the injunction issued by such Court and any statute upon which such injunction was purportedly based were unconstitutional and void and of no effect whatsoever, and contrary to the Fourteenth Amendment to the Constitution of the United States, in that such injunction and any statute upon which it is purportedly

based deprives the unions, their officers, members, and agents, from exercising the constitutional rights assured by Section 1 of the Fourteenth Amendment to the Constitution of the United States.[1]

The federal question of whether the Wisconsin Statutes in question or the judgment of the Court, whether based on such statutes or not, were violative of the Constitution of the United States thus was raised before every tribunal in which argument was heard. The Supreme Court of Wisconsin because of an equal division among the Justices of that Court affirmed the judgment appealed from under the Wisconsin rule, the Wisconsin Supreme Court thus adopting the holding of the Circuit Court for Milwaukee County that sections 111.06 (2) (e) and 111.02 (8) (the lower court mistakenly referred to section 111.04 as defining labor disputes), sections 111.06 (2) (a) (b) (e) and (f) were constitutional in so far as they were applicable to the facts in the instant case.

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1 Under the Wisconsin Supreme Court practice errors are assigned in the brief. In the brief of petitioners herein, appellants before the Wisconsin Supreme Court, under the title "Errors Assigned," the specific assignment of errors was as follows:

"The Circuit Court for Milwaukee County erred in restraining the defendants from engaging in the activities engaged in in the instant case for the reasons that:

"A. The Court was without jurisdiction to issue the same for the following reasons:

"(1) The subject matter of the action, relating to violation of Chapter 111, Wisconsin Statutes 1939, fell within the sole and exclusive jurisdiction of the Wisconsin Employment Relations Board.

"(2) The plaintiff had an adequate remedy at law.

"(3) The action taken and order entered by the National Labor Relations Board ousted the Court from jurisdiction.

"(4) The complainant did not come into court with clean hands.

"B. Such injunction and any statute upon which it is purportedly based are unconstitutional and void and of no effect whatsoever, and contrary to the Fourteenth Amendment to the Constitution of the United States and Article I of the Constitution of the State of Wisconsin, in that such injunction and the statutes upon which it is purportedly based deprive the unions, their officers, members and agents from exercising the constitutional rights of freedom of speech, press, and assemblage, guaranteed by the aforesaid Constitutions.

"C. The injunction is too broad, vague, and indefinite, and its issuance cannot be justified in law or by the facts in the instant case."

The decision of the Wisconsin Supreme Court, therefore, resulted in a determination of the federal question adversely to the petitioners and in favor of the validity of the statutes and judgment alleged by the petitioners to deprive them of the constitutional rights assured by Section 1 of the Fourteenth Amendment to the Constitution of the United States.

Some of the cases relied on in the courts below, and which the petitioners believe are in support of their position, and which will influence the decision of this Court, are as follows:

Thornhill v. Alabama, 310 U. S. 88, 60 S. Ct. 736;
Carlson v. California, 310 U. S. 106, 60 S. Ct. 746;
Senn v. Tile Layers' Protective Union, 301 U. S. 468, 57 S. Ct. 857;
American Federation of Labor v. Swing, 312 U. S. 321, 61 S. Ct. 568;
Milk Wagon Drivers' Union v. Meadowmoor Dairies, Inc., 312 U. S. 287, 61 S. Ct. 552.

A copy of the printed record in this case used in the court below, in accordance with the rules and as certified to be true and correct by the Clerk of the Supreme Court of the State of Wisconsin, is hereby furnished, attached to, and made a part of this application in compliance with rule 38, paragraph 1, of the rules of this court.

STATUTES INVOLVED.

Section 11.02 (8), Wis. Stats. 1939:

"The term 'labor dispute' means any controversy between an employer and the majority of his employees in a collective bargaining unit concerning the right or process or details of collective bargaining or the designation of representatives. Any organization with which either the employer or such majority is affiliated may be considered a party to the labor dispute."

Section 111.06 (2), Wis. Stats. 1939:

"It shall be an unfair labor practice for an employe individually or in concert with others:

"(a) To coerce or intimidate an employe in the enjoyment of his legal rights, including those guaranteed in Section 111.04, or to intimidate his family, picket his domicile, or injure the person or property of such employe or his family.

"(b) To coerce, intimidate or induce any employer to interfere with any of his employes in the enjoyment of their legal rights, including those guaranteed in Section 111.04, or to engage in any practice with regard to his employes which would constitute an unfair labor practice if undertaken by him on his own initiative.

* * * * * * *

"(e) To co-operate in engaging in, promoting or inducing picketing, boycotting or any other overt concomitant of a strike unless a majority in a collective bargaining unit of the employes of an employer against whom such acts are primarily directed have voted by secret ballot to call a strike.

"(f) To hinder or prevent, by mass picketing, threats, intimidation, force or coercion of any kind the pursuit of any lawful work or employment, or to obstruct or interfere with entrance to or egress from any place of employment, or to obstruct or interfere with free and uninterrupted use of public roads, streets, highways, railways, airports, or other ways of travel or conveyance."

QUESTIONS PRESENTED.

The following federal questions, raised and argued before the Supreme Court of Wisconsin, are again brought forward here:

1. Is Wisconsin's so-called "Peace Act," particularly Section 111.06 (2) (e), prohibiting employees in a bar-

gaining unit from peaceful picketing or boycotting in connection with a strike, unless a majority in such unit have authorized the strike, void as contrary to the Fourteenth Amendment, depriving petitioners of the right to free speech and denying the equal protection of the laws?

2. Is an injunction valid which prohibits peaceful activities, unattended by violence, for the purpose of persuading employees who are not members of a labor organization to join and become members of such organization?

3. May a state, by confining its definition of the term "labor dispute" to a dispute between an employer and a majority of his employees thus limit the peaceful activities of labor organizations and members thereof, such as picketing and boycotting, and afford the basis for the issuance of an injunction by a court of equity on the ground that such peaceful activities are unlawful because of the absence of a labor dispute as so defined?

REASONS RELIED ON FOR ALLOWANCE OF WRIT.

The affirmance of the judgment by the Supreme Court of the State of Wisconsin is in conflict with the decisions of this Honorable Court in **Thornhill v. Alabama**, 310 U. S. 88; **Carlson v. California**, 310 U. S. 106; **American Federation of Labor v. Swing**, 312 U. S. 321, and **Milk Wagon Drivers' Union v. Meadowmoor Dairies, Inc.**, 312 U. S. 287.

PRAYER FOR WRIT.

Wherefore, your petitioners pray that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the Clerk of the Supreme Court of the State of Wisconsin, commanding that Court to certify and send to this Court for review and determination, on

a day certain to be therein named, a full and complete transcript of the record and all proceedings in the case numbered 151 and entitled **Carpenter Baking Company, a Corporation, v. Bakery Sales Drivers Local Union No. 344 (A. F. of L.) et al.**, and that the judgment of the Supreme Court of the State of Wisconsin may be reviewed by this Honorable Court, and that your petitioners may have such other and further relief in thepremises as to this Honorable Court may seem just and meet; and your petitioners will ever pray.

JOSEPH A. PADWAY and
A. G. GOLDBERG,
Counsel for Petitioners.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1941.

No. .....,

BAKERY SALES DRIVERS LOCAL UNION NO. 344 (A. F. of L.), AUTO TRUCK DRIVERS JOINT COUNCIL NO. 50 (A. F. of L.), ELMER JOHNSON, JOSEPH REICHARTZ, GILBERT SCHLECHTA and G. McMICKEN,

Petitioners,

vs.

CARPENTER BAKING COMPANY, a Corporation,

Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

THE OPINION OF THE COURT BELOW.

The opinion of the Supreme Court of the State of Wisconsin is reported in 236 Wis. 367, and is appended hereto as Exhibit A.

JURISDICTION.

The statutory provision believed to sustain the jurisdiction of this court is section 237, as amended by the Act of February 13, 1935, U. S. C. A., Section 344-b, Title 28.

As seen in the jurisdictional statement in the foregoing

petition, the constitutional objections to the legislation upon which the present injunction is based and to the injunction itself were raised and argued before the Circuit Court of Milwaukee County and the Supreme Court of the State of Wisconsin, the court of last resort for all causes in the state. The constitutional objections were discussed and passed upon by the Circuit Court for Milwaukee County and the judgment of that court was affirmed by the Supreme Court of the State of Wisconsin without opinion by virtue of the equal division of the judges of that court.

STATEMENT OF THE CASE.

A summary statement of the case appears in the petition for writ of certiorari, which, in the interest of brevity, is incorporated herein by reference.

SPECIFICATION OF ERRORS.

The Supreme Court of the State of Wisconsin, in affirming the judgment of the Circuit Court for Milwaukee County, erred in the following respects:

1. In sustaining the judgment of the Circuit Court providing that your petitioners be enjoined and restrained

> "(1) From adopting means and engaging in conduct intended and reasonably calculated to coerce and intimidate plaintiff's employes while performing their usual and ordinary services for the plaintiff.
>
> "(2) From following plaintiff's employes and delivery trucks while said trucks are being used to deliver bakery products to plaintiff's customers.
>
> "(3) From inciting or attempting to persuade persons not to deal with the plaintiff or the plaintiff's employes or with retail dealers offering plaintiff's products for sale.
>
> "(4) From otherwise intentionally molesting, injuring or interfering with the plaintiff in its business" (R. 32, 33).

2. In confirming the findings of the Circuit Court for Milwaukee County (conclusions of law):

> "First: That the acts of the defendants constitute unfair labor practices within the meaning of the term 'unfair labor practice,' as defined by Section 111.06 of the Statutes of the State of Wisconsin.
>
> "Second: That no labor dispute exists between the plaintiff and defendants as defined in Section 111.04 of the Statutes of the State of Wisconsin.
>
> "Third: That the provisions of Chapter 111 of the Statutes of the State of Wisconsin are valid and constitutional enactments and do not violate the constitutional guaranty of freedom of speech" (R. 30).

3. In sustaining the following finding of fact made by the Circuit Court for Milwaukee County, Wisconsin, which

is unsupported by the record and which constitutes a conclusion of law on the part of such court that peaceful picketing and boycotting activities and the exerting of "economic pressure" are unlawfully coercive and intimidatory:

> "Seventh: That the defendants herein have, in concert with others as well as individually, contrary to the provisions of Section 111.06, Wisconsin Statutes, coerced and intimidated the employes of the plaintiff in the enjoyment of their legal rights, including those guaranteed in Section 111.04, Wisconsin Statutes, and have, by such coercion and intimidation, injured said employes in their property by such means; that the defendants have, individually and in concert with others, by exerting economic pressure upon plaintiff's employes as well as upon customers of the plaintiff solicited by such employes, intended to coerce, intimidate and induce the plaintiff employer to interfere with its employes in the enjoyment of their legal rights, including those guaranteed in Section 111.04, Wisconsin Statutes, and have thereby injured the plaintiff in its trade and business for the purpose of compelling the plaintiff to influence and coerce its said employes to designate the defendants Bakery Sales Drivers Local Union No. 344 (A. F. of L.), or Auto Truck Drivers Joint Council No. 50 (A. F. of L.), as a collective bargaining representative for such employes. That the defendants, by their conduct as individuals, as well as in concert with others in this regard, have intended to and have in fact injured the plaintiff in its trade and business. That the said defendants, individually and in concert with others, have further hindered and prevented, by the coercion of the plaintiff's employes, the pursuit of the lawful work and employment of said employes, and have further accomplished a substantial diminution of sales of the products manufactured by the plaintiff, which said employes sought to sell and deliver to customers upon their respective routes" (R. 26, 27).

ARGUMENT.

Inasmuch as the Wisconsin Supreme Court wrote no opinion specifically answering the contentions made and the errors assigned by these petitioners we must look to the decision, findings of fact, and conclusions of law of the Circuit Court for the purpose of ascertaining the basis for the issuance of the injunction, the reasons therefor, and the treatment of the constitutional question involved.

I.

The Lower Court's Decision Is Based Upon the Purported Applicability of the Provisions of Section 111.06 (2) (e), 111.02 (8), Wis. Stats. 1939, and the Case of Hotel and Restaurant Employees et al. v. Wisconsin Employment Relations Board Now Before This Court for Review. Such Sections of the Statute are Clearly Unconstitutional.

Examination of the lower court's decision (R. 16-23) discloses that the judgment is based upon the purported application of certain provisions of Chapter 111, Laws of 1939. (It was argued by the Union in both the Circuit Court and the Wisconsin Supreme Court that any claimed violations of Chapter 111 had to be put to the Wisconsin Employment Relations Board, charged with the duty of administering the provisions of Chapter 111. This argument was rejected by the Circuit Court. Inasmuch as this point involves a question of local law only, we do not pursue it any further in the instant proceedings.)

The Circuit Court found that there was no labor dispute as that term is defined in Section 111.02 (8) Wis. Stats. 1939. That section reads as follows:

> "111.02 (8). The term 'labor dispute' means any controversy between an employer and the majority of his employes in a collective bargaining unit concern-

ing the right or process or details of collective bargaining or the designation of representatives. Any organization with which either the employer or such majority is affiliated may be considered a party to the labor dispute."

The Circuit Court further found that the stipulated peaceful activities of the petitioners were in violation of the following provisions of Section 111.06, Wis. Stats. 1939:

"111.06 (2). It shall be an unfair labor practice for an employe individually or in concert with others:

"(a) To coerce or intimidate an employe in the enjoyment of his legal rights, including those guaranteed in section 111.04, or to intimidate his family, picket his domicile, or injure the person or property of such employe or his family.

"(b) To coerce, intimidate or induce any employer to interfere with any of his employes in the enjoyment of their legal rights, including those guaranteed in section 111.04, or to engage in any practice with regard to his employes which would constitute an unfair labor practice if undertaken by him on his own initiative.

* * * * * * *

"(e) To co-operate in engaging in, promoting or inducing picketing, boycotting or any other overt concomitant of a strike unless a majority in a collective bargaining unit of the employes of an employer against whom such acts are primarily directed have voted by secret ballot to call a strike.

"(f) To hinder or prevent, by mass picketing, threats, intimidation, force or coercion of any kind the pursuit of any lawful work or employment, or to obstruct or interfere with entrance to or egress from any place of employment, or to obstruct or interfere with free and uninterrupted use of public roads, streets, highways, railways, airports, or other ways of travel or conveyance."

The Circuit Court found that the activities of the union "definitely offends against the provisions of Subsection (e) of Section 111.06, paragraph (2), for it calls for a co-operation of a number of members of the union to engage in, promote or induce picketing, boycotting, or other overt act. In the language of the statute, this conduct is declared to be an unfair labor practice. The right of the state by statute to regulate such concert of action as here invoked is declared in the opinion of the Court in **Hotel & Restaurant Employees' International Alliance, Local No. 122, et al. v. Wisconsin Employment Relations Board et al.** (November, 1940), and is the answer to the argument that Section 111.06 violates the constitutional guaranty of freedom of speech" (R. 22).

The Court further held, in passing upon the challenge to the constitutionality of those statutes, as follows:

> "I believe that all of the matters which are urged by the defendants, challenging the constitutionality of the statutes in question, are decided in the case of **Hotel & Restaurant Employees' International Alliance, Local No. 122, et al. v. Wisconsin Employment Relations Board et al.** * * *" (R. 23).

(The case aforereferred to by the lower court is now before this Court for review, being case No. 124 on the October, 1941, calendar, certiorari granted October 13, 1941.)

Pertinent among the findings of fact relied on by the Court to support the applicability of the statutes and the Hotel and Restaurant Employees case are the following:

Finding numbered five that a majority of the company's salesmen have refused to designate the petitioning unions as their collective bargaining representatives (R. 25).

Finding numbered 7 that the activities of the petitioning unions were coercive, intimidatory, and have injured the

employees of the company and the company because of "economic pressure" exerted upon the employees and upon the customers of the company (R. 26, 27).

Finding numbered eight that the petitioners have cooperated together in engaging in, promoting and inducing the boycotting of the bakery products manufactured for sale by the plaintiff (company) and sold by employees of the company, "all contrary to the provisions of Section 111.06 (2), (e), Wisconsin Statutes," requiring a majority vote of employees (R. 27).

Finding nine, that the employees of the company were followed, and that when such employees stopped to make deliveries at retail dealers' places of business and requested and encouraged the customers to discontinue purchasing bakery products, and that such members picketed the trucks and the places of business, carrying signs and placards stating: "This Carpenter Baking Co. employe is not a member of Bakery Sales Drivers Union Local 344. Please do not patronize" (R. 27, 28).

Finding numbered twelve, that none of the petitioners named is an employee of the company (R. 28).

Finding numbered thirteen, that the conduct has resulted in the loss of patronage to the company (R. 29).

Examination of the conclusions of law, hereinbefore set forth, further demonstrates that the provisions of Section 111.06 were held to sustain the issuance of an injunction, which restrained the petitioners, among other things, from inciting or attempting to persuade persons not to deal with the company or the company's employees or with retail dealers offering the company's products for sale.

The injunction in this case, therefore, is bottomed upon the purported provisions of Section 111.06 of the Wis-

consin Statutes, particularly Sections 111.06 (2) (e) and 111.02 (8) thereof.

Argument on both of these statutes has been recently presented to this Court in the case of **Hotel & Restaurant Employees' International Alliance, Local No. 122, et al. v. Wisconsin Employment Relations Board et al.**, 236 Wis. 329, 294 N. W. 632. The decision of the Wisconsin Supreme Court in that case, which is now under review by this Court, was relied upon by the Circuit Court as sustaining its conclusion that the provisions of the statute were constitutional and supported the injunction issued. Inasmuch as extensive argument was made in the aforementioned case concerning the constitutionality of Section 111.06 (2) (e) and the companion Section 111.02 (8), we will not make any further argument thereon other than to point out that under the decisions of this Court in the cases of **Thornhill v. Alabama**, supra; **Carlson v. California**, supra; **American Federation of Labor v. Swing**, supra, and **Milk Wagon Drivers' Union v. Meadowmoor Dairies, Inc.**, supra, such statutes are clearly unconstitutional and void.

There then remains for discussion only the question of whether or not the injunction herein, under the facts of this case, can be supported against the claim that such injunction deprives these petitioners of rights, privileges, or immunities under the Constitution of the United States. This, in turn, requires an examination of the facts.

II.

The Undisputed Stipulated Facts of This Case Demonstrate Conclusively That the Injunction Cannot Be Sustained Under Any Accepted Theory of Law.

The case was tried in the main upon stipulated set of facts (R. 35-54). Pertinent herein are the following paragraphs in the stipulation:

"1. Since 1933, the defendant labor union, Bakery Sales Drivers Local Union No. 344, and its predecessor, Local No. 347, have attempted to organize the bakery sales drivers of the Carpenter Baking Company, the plaintiff in this action.

* * * * * * *

"4. In September of 1938, the Bakery Sales Drivers Local Union No. 344 had several meetings with the sales drivers of the Carpenter Baking Company for the purpose of organizing them.

* * * * * * *

"17. Since the plant reopened on April 4, 1939, Local 344 has continued its efforts to unionize the bakery sales drivers, and prior to August 12, 1940, it solicited individually such sales drivers on numerous occasions, and at least two meetings were held of the sales drivers, which meetings were called by Local 344. * * *

"18. It is agreed that on June 8, 1939, Exhibit G was forwarded by Joint Council No. 50 to all of the Carpenter Baking Company sales drivers; that on May 14, 1940, Exhibit H[2] was forwarded to Mr. Jack Miller, president of the Brotherhood of Carpenter Bakery Sales Drivers, and a similar letter was forwarded to each sales driver employed by the Carpenter Company; that on June 27, 1940, Exhibit I[3] was forwarded to Mr. Jack Miller, president of the Brotherhood of Carpenter Bakery Sales Drivers, and a similar letter was forwarded to each sales driver employed by the Carpenter Baking Company.

"19. It is further agreed that on May 16, 1940, a meeting of the Carpenter Baking Company sales drivers was held at the Maryland Hotel, at which time Mr. Johnson addressed such drivers, explaining the benefits of membership in Local 344 and soliciting the membership of those present, and on July 2, 1940, a similar meeting was held at the Atlantic Hotel, at

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2, 3 These exhibits are not set forth in full in the printed case. The letters referred to are requests made by the union to the employees that they become members of such organization.

which Mr. Johnson again made a similar explanation and again solicited the membership of the sales drivers present.

"At the meeting held on May 16, 1940, Mr. Johnson, in addressing the meeting, stated that there were three Carpenter Baking Company sales drivers that were members of the union. When his statement was challenged, a vote was taken, and the secret ballots established that three sales drivers were members of Local 344. After further discussion another vote was taken to determine how many of the employes present would favor having all the Carpenter Baking Company sales drivers affiliated with Local 344, and the vote was eight to eight, there being sixteen employes voting. It is also agreed that such sixteen does not constitute the entire number of sales drivers; that the Carpenter Baking Company had at that time in its employ twenty-eight bakery sales drivers. The three sales drivers who were members of Local 344 on May 16, 1940, had become such members between April 4, 1939, and May 16, 1940.

"20. The minutes of a meeting of Local 344 held on April 9, 1940, contained the following:

> " 'Motion made and seconded to grant the Executive Board the authority to advertise those Carpenter Sales drivers who were not members of Local 344 in order to get them to join. Motion carried 100 per cent.'

"The minutes of a special meeting called and held on July 23, 1940, contained the following:

> " 'Purpose: To vote on the question of whether to assess each member $1.00 per month, starting with August dues, for the duration of the controversy with the M. Carpenter Baking Company sales drivers.
>
> " 'Motion made and seconded to levy a $1.00 assessment per month, per member, starting with August dues, for the duration of our controversy with the M. Carpenter Baking Company sales drivers. Motion carried; 116 in favor, 25 opposed.'

"21. On August 12, 1940, at about 4:30 a. m., Local 344, under the direction of its business manager Elmer Johnson, commenced the following activities:

"The union secured various individuals to follow the Carpenter Bakery delivery trucks on their routes throughout the City of Milwaukee and vicinity. Some of such individuals were paid for their services in following such trucks. The procedure in following the trucks was substantially as follows:

"Automobiles were used by the union, and in each automobile there were two men, one wearing a canvas sign suspended from the shoulders and visible from both the front and the rear, which sign contained the following words:

> " 'This Carpenter Baking Co. employe is not a member of Bakery Sales Drivers Union Local 344. Please do not patronize.'

"One of said canvas signs is marked 'Exhibit J' and is shown in the picture marked 'Exhibit K.'

"Such automobiles followed the bakery delivery trucks from one customer's place to another, and, as the delivery truck would stop to make a delivery to a customer, the union representative wearing the sign walked back and forth alongside of the truck and, after the first three or four days, such sign bearer walked back and forth in front of the customers' places of business while the Carpenter Baking Company employe was servicing such customers, regardless of whether the truck was stopped in the immediate vicinity of the customer's place of business.

"The other union representative entered the customers' places of business and informed such customers that the bakery sales drivers were not members of Local 344, and requested such customers to co-operate with the union by refusing to purchase or by limiting their purchases of bakery goods offered for sale by such Carpenter Baking Company employes.

"Prior to August 12, 1940, the Carpenter Baking Company merely supplied a single sales driver for

each truck. Several days after the commencement of the union activities on August 12, 1940, the Carpenter Baking Company supplied an additional man to accompany each sales driver that was followed by union representatives, the helper in most instances remaining in the truck while the sales driver serviced the customer.

"On occasions there would be more than one union automobile in the vicinity of a customer's place of business while being serviced by a Carpenter Baking Company employe. This resulted from the fact that Mr. Johnson, who was in charge of activities for the union, would on occasions drive his automobile and stop in the vicinity of customers' places of business while deliveries were being made.

"It is also agreed that on occasions the Carpenter Baking Company sales drivers used regular automobiles in making deliveries rather than the usual delivery trucks. This was done for the purpose of evading the union representatives, and a private automobile and a truck may have been used on the same route at the same time.

"It is further agreed that the number of union automobiles that have followed bakery delivery trucks from August 12th to the date hereof has varied from two to six.

"It is agreed that since the union activities commenced on August 12, 1940, the Carpenter Baking Company has sustained a substantial loss of business, which loss is estimated by the Carpenter Baking Company in excess of 15 per cent of its total volume of business; and it is further agreed that a number of customers have ceased to handle Carpenter Baking Company products since such activities commenced on August 12, 1940, and that other customers have limited the purchases made by them.

"24. The plaintiff objects to the relevancy of the statements contained in this paragraph, but concedes the accuracy of such statements.

"Local 344, or its predecessor, Local 347, commenced intensive organization activities of the bakery sales drivers in the City of Milwaukee in the year 1933. On November 1, 1934, it secured its first written all-union contracts with two major bakeries in the Milwaukee area. In the spring of 1938, it succeeded in organizing and securing written all-union agreements from all of the major bakeries in the Milwaukee area with the exception of the Carpenter Baking Company.

"In some of the major bakeries, other than the Carpenter Baking Company, some sales drivers did some work on Sunday in addition to the work performed by them on the other six days of the week, and that there was no definite hour set for sales drivers to go off the street, and some such drivers continued work until 5 or 6 o'clock in the evening. Some major bakeries, other than the Carpenter Baking Company, did not provide vacations with pay for sales drivers. In some major bakeries, other than the Carpenter Baking Company, for a period of time there was no guaranteed or base wage provided, the sales drivers working on a straight 10 per cent commission basis.

"The signed contracts with the major bakeries, other than the Carpenter Baking Company, contain provision for a six-day week for sales drivers, no work to be performed on Sunday. There is also a provision in such contracts providing that sales drivers employed by these bakeries must be off the street with their trucks not later than 2:15 p. m.

"Such contracts provide for vacations with pay ranging from one week to two weeks, depending on length of service, and provide a guaranteed or base rate of $32.00 per week, plus 10 per cent commission on sales exceeding $270.00 per week. (The first union contracts provided a base rate of $27.00 per week plus commissions.) There are other benefits for the sales drivers provided in such contracts.

"It is agreed that the Carpenter Baking Company has for many years given vacations with pay to its

sales drivers, and that for many years such bakery sales drivers have not made deliveries on Sunday, and that said company attempts to have all of its employes off the street at 2:30 p. m.; the last contract with the Brotherhood provided that such employes should be off the street by 2:30 p. m.

"During the past seven years sales drivers employed by the Carpenter Baking Company have been paid a guaranteed salary, plus commissions on sales made, which guarantees have varied from $27.00 to $32.50 per week. At the present time the guarantee is $32.50 per week on sales up to $200.00 per week, and on sales in excess of $200.00 per week commissions are paid upon a graduated scale, depending upon the particular territory that each sales driver serves.

"25. The defendants propose to continue the activities that they have followed since August 12, 1940.

"26. **There has been no violence since the commencement of the activities on August 12, 1940.** The nature of the activities carried on is such that the public officers (police officers) would not have any jurisdiction, and such officers are powerless to afford the plaintiff any remedy in connection with such activities; for that reason there has been no occasion or necessity for plaintiff to give such officers any notice of the proceedings pending in this court. (Emphasis ours.)

"27. Defendants concede that the activities presently carried on by them are for the purpose of persuading people to desist and refrain from purchasing bakery products offered for sale by Carpenter Baking Company sales drivers who are not members of Local 344.

"Defendants also concede they have had information that the compensation of Carpenter Baking Company sales drivers is in part dependent upon commissions based upon the amount of sales made by such sales drivers, and that defendants have sought to reduce the sales in order to reduce the earnings of

such sales drivers and thereby apply economic pressure upon the sales drivers to obtain the union membership of such sales drivers.

"28. Defendants claim that at the present time Local 344 has eight members that are in the employ of the Carpenter Baking Company as sales drivers, but the plaintiff has no knowledge concerning the number, and, therefore, does not concede the same."

In addition to the above stipulated facts, some testimony was taken relating to the activities of the pickets. This testimony does not in any way vary nor add to the stipulated facts above set forth, other than the testimony of one driver for the company, who said the drivers would make efforts to elude the automobile driven by union men, which followed the company's trucks for the purpose of picketing at the time a delivery was made (R. 79, 80).

It was on this record that the Circuit Court for Milwaukee County made the findings of fact already referred to herein that the activities of the petitioners have resulted in coercion and intimidation of the employees, have been for the purpose of coercing, intimidating and inducing the company to interfere with the legal rights of its employees, and have hindered and prevented by coercion of the employees the pursuit of lawful work in the employment of the employer.

It was also on these undisputed facts that the judgment appealed from was entered.

A. The trial court's designation of conduct as "coercive" or "intimidating" does not and cannot justify restraint of what this Court has declared to be the exercise of right of free speech.

It is undisputed in the record that ~~the defendant~~ Local 344 represents eight of the eligible twenty-seven em-

ployees of the company (R. 73); that for many years it has sought to persuade the remaining employees to join the organization and to secure a contract with the Carpenter Baking Company so that wages, hours and working conditions in the bakery industry can be standardized, to the mutual advantage of employer and employee (R. 35).

It is undisputed also that, since Augst 12, 1940, **all of the activities of the ~~defendants~~ have been directed solely to the employees of the ~~plaintiff~~ for the purpose of securing their membership in the ~~defendant~~ labor organization, and for the purpose of advising the public of their nonunion status.** The picketing and bannering which the Company complained of in the instant case were directed solely to such employees, not only by the express language of the signs, but also by information given to the public generally. There is no indication any place in the record that the activities were otherwise.

The only activities which the Company complained of and which were before the Court, other than the following of the company's delivy trucks, consisted of the peaceful exhibiting of placards to advise the public that certain employees were not members of the petitioning labor organization, and requesting that persons who were solicited to purchase products delivered by the nonunion employees, whether for the purposes of resale or for the purposes of consumption, do not patronize such employees or purchase such products from such nonunion employees. (On the temporary hearing for injunction, and subsequent thereto, it was agreed that the "please do not patronize" clause would be eliminated from the placards, and it has not been used since.)

There was not contained in any of these activities any misrepresentation of any sort. None of the activities were accompanied by violence of any kind. The immediate

objective of the union was to secure the membership of the employees. Naturally and normally it was felt that after securing the membership of the employees the union and the company could then lawfully negotiate a collective bargaining agreement similar to that then prevailing in the industry.

The trial court in its decision (R. 22) stated that the desire or plan of the union to exert "economic pressure" upon the salesmen to the end that they become members of the union definitely offended against the provisions of Section 111.06 (2) (l).

In the instant case the activities complained of and enjoined by the order of the Court fall clearly within the scope of conduct which the United States Supreme Court has held to be free from restraint in the Thornhill, Carlson and Swing cases. The injunction clearly violates the constitutional rights of these defendants.

It will undoubtedly be argued by the respondents that whatever may be the law as set out in the **Thornhill, Carlson** and **Swing** cases, such cases are inapplicable to the facts in the instant case because of the findings of the Court that the peaceful conduct constituted "coercion" or "intimidation."

The circumstance that the trial court has in its findings of fact described such conduct as being "coercive" or "intimidatory" does not alter the situation one bit. Conduct which is described and characterized by the United States Supreme Court as the exercise of the right of free speech cannot be characterized by lower courts as being **unlawfully** coercive or **unlawfully** intimidatory. The effect of such activities may be "coercive" or "intimidatory," but only in the sense that the person who is referred to in such activities may eventually yield to the peaceful and truthful persuasion, although he had formerly deter-

mined not to. Such peaceful activities, however, cannot be defined in the terms of **results**, but must be defined in the terms of **what it is.**

The lower court could not, therefore, restrain the truthful and peaceful exercise of the right of free speech on the ground that it was at the same time "coercive" or "intimidatory."

The conduct engaged in in the instant case might be termed "pressure." It might be coercive or intimidatory in so far as its **effect** is concerned. That, however, does not remove it from the constitutional protection assured to peaceful conduct in the **Thornhill, Carlson** and **Swing** cases. The effect must be distinguished from the means.

In Volume IV of Restatement of the Law of Torts, paragraph 778, it is very carefully pointed out that there is a distinction between persuasion and coercion, and that such distinction was due "* * * not to a difference in the **purpose or result** of the employees' conduct, in so far as 'A' is concerned, but rather to the difference in the **means** by which the third persons are influenced to act." (Emphasis ours.)

In reviewing the findings of fact and the conclusions of law in the instant case it is manifest that what the lower court has done is look upon the **result** of the conduct complained of in so far as the employees, the employer and the third persons are concerned, instead of looking upon the **means** adopted by the labor organization. This approach is rejected by the decisions of this Court and the Restatement of Law. If in accordance with the decisions we look upon the **means** rather than the **result**, it must necessarily follow that the conduct complained of in this case is not subject to restraintby virtue of any provisions of the Wisconsin statutes, or by virtue of any general equity power of the Wisconsin courts.

To speak of peaceful activities as constituting coercion or intimidation is to fall prey to the "tyranny of labels," which Justice Cardozo referred to in **Palko v. State of Connecticut**, 302 U. S. 391, 82 L. Ed. 288.

Inasmuch as in the instant case there is a situation involving competition between labor organizations for membership among the employees in the respondent company the decision in the case of **Nann v. Raimist**, 255 N. Y. 307, 174 N. E. 690, written by the late Justice Cardozo, then Chief Justice of the New York Court of Appeals, is directly pertinent. Meeting the complaint in that case that one labor organization was inaccurate in its statement of the facts of the controversy, the Court stated:

> "There is argument and entreaty, often colored and hectic, involving perhaps at times the deduction from meager facts of debatable conclusions. There is no such malevolent distortion as to justify repression. Courts have enough to do in restraining physical disorder without busying themselves with logomachies in which the embattled words are the expression of the opinion of the writer or the speaker. If there is redress for such a wrong, unassociated with wrongful action, the remedy is not in equity * * *"

Referring to the sweeping terms of the injunction, the Court stated:

> "The other prohibitions are an impairment of the defendant's right to win converts over to its fold by recourse to peaceable persuasion, and to induce them by like methods to renounce allegiance to its rival. Recent decisions of this Court have established that fundamental right too emphatically and forcefully to make further indication needful."

Also pertinent herein is the statement of the Oregon Court in the case of **George B. Wallace Company v. International Association**, 115 Or. 652, 63 Pac. (2) 1090, holding:

"The doctrine that picketing is necessarily a species of coercion and intimidation, is dogma long discarded."

The opinion of the court below is predicated in some measure on the belief that the activities of the organization are really directed against the employer, particularly since such activities must necessarily result in loss to the employer. The Court, therefore, restrained the otherwise legitimate activity of the petitioners because of such resulting injury, this apparently on the assumption that the employer must be made immune from the results of advertising the nonunion status of the employees. This argument has best been answered by the statement in the **Thornhill** case:

"It may be that effective exercise of the means of advancing public knowledge may persuade some of these reached to refrain from entering into advantageous relations with the business establishment which is the scene of the dispute. Every expression of opinion on matters that are important has the potentiality of inducing action in the interest of one rather than another group in society. **But the group in power at any moment may not impose penal sanctions on peaceful and truthful discussion of matters of public interest merely on a showing that others may thereby be persuaded to take action inconsistent with its interests.**

* * * * * * *

"We hold that the danger of injury to an industrial concern is neither so serious nor so imminent as to justify the sweeping proscription of freedom of discussion embodied in Section 3448." (Emphasis ours.)

It becomes apparent from a reading of the findings of fact that in so far as it is claimed that the conduct of the petitioners is coercive, intimidatory, or for improper purposes, such findings are pure conclusions based upon

the result of the activities, rather than upon the means and purposes of the activities. No place in the record is there any evidence of any kind that would sustain a finding of coercion, intimidation, or intent to compel the employer to violate any of the laws of Wisconsin.

The injunction, therefore, directed as it is to the peaceful and legitimate activities of the ~~defendants~~ petitioners to attain proper and lawful objectives, is in clear violation of the constitutional rights of the petitioners.

B. **The record and findings of fact show conclusively that the peaceful, lawful activities of the petitioners are directed to the lawful purpose of advertising the nonunion status of the employees and seeking to enlist them into union membership. This is a dispute between employees or competing labor unions.**

Anticipating the attempt to distinguish the instant case from the **Thornhill, Carlson** and **Swing** cases by insisting that the petitioners' activities were directed to an illegal purpose, to wit, seeking to compel the company to interfere with the rights of its employees, we examine the decision and findings of the lawer court.

(1) *The Decision is based upon the Hotel and Restaurant Employees case and the applicability of Sec. 111.06 (2) (e), Wisconsin Stats. 1939.*

We have already pointed out that the court below proceeded upon entirely erroneous theories of law, and that the judgment herein, as well as many purported findings of fact and conclusions of law, are not based upon or responsive to actual facts, but are based upon the economic theory and predelictions of the court below. For example, the Court in its decision refers to the property right of delivery salesmen to peacefully solicit the customers

and deliver bakery products to them. There is no challenge here of the right of these salesmen to engage in such activities. There is only the claim here of the right of the petitioners to advise the public that such salesmen engaged in such activities are nonunion men and are competing with union men.

This situation is directly similar to that which was before the Wisconsin Court in the case of **Senn v. Tile Layers' Protective Association**, 222 Wis. 383, 268 N. W. 270. In that case it was very properly pointed out that the person picketed was free to perform all the work he could get in whatever manner he wishes to perform it; that he could work long hours, and bid for contracts at a low figure, based upon low wages for himself and on such long hours. The Court stated:

> "In the judgment of respondents, his conduct in this respect affects their opportunity of maintaining a standard of better wages, regulated hours, and improved working conditions, and the collision of the two sets of rights, the one in appellant, and the other in respondents, created a labor dispute within the definition of the code (Sections 103.51 to 103.63, Statutes). If the trade turns from one to the other as the result of the dispute the injury is incidental and injuria absque damno."

In the course of the decision of the United States Supreme Court affirming the **Senn** case, reported in 301 U. S. 478, Justice Brandeis affirmed the above language of the Wisconsin Court, stating:

> "It is true that disclosure of the facts of the labor dispute may be annoying to Senn even if the method and means employed in giving it publicity are inherently unobjectionable. But such annoyance, like that often suffered from publicity in other connections, is not an invasion of the liberty guaranteed by

> the constitution. * * * It is true, also, that disclosure of the facts may prevent Senn from securing jobs which he hoped to get. But a hoped for job is not property guaranteed by the constitution, and the diversion of it to a competitor is not an invasion of a constitutional right."

So much, then, for the solicitude of the court below for the nonunion employees at the cost of prohibiting the constitutional right of the union employees.

The gist of the opinion of the court below can be found in the statement of that Court that the plan of the union "definitely offended against the provisions of subsection (e) of section 111.06 (2), for it calls for a co-operation of a number of members of the union to engage in, promote or induce picketing, boycotting or other overt acts."

The Court then goes on to state that, inasmuch as this statute was upheld in the **Hotel & Restaurant Employees** case, holding such statute to be constitutional, and inasmuch as the **Hotel & Restaurant Employees** case declared the public policy of the Legislature to be constitutional, "the parties to this action are presently bound to observe and abide by the regulations imposed upon their conduct in their relations to each other."

The decision of the court below, then, is very obviously and unquestionably based upon interpretation of the decision of the Wisconsin Court in the **Hotel & Restaurant Employees** case now before this Court for review. Extensive argument having only recently been made in such case, we do not repeat such argument herein other than to point out that there is not any claim of violence in this case. It has been expressly stipulated that there has been no violence (R. 53).

(2) *The decision of the lower court recognizes that the activities are directed to persuading the employees to join the petitioning union.*

In the Court's decision there is an express recognition of the purpose and object of the activities of the petitioning union. The Court stated (C. 22):

> "We are confronted in this case with actions that are admittedly part of a design or plan to exert 'economic pressure' upon these salesmen and to reduce their earning capacity, **to the end that they will become members of the union, which they have declined to join at various meetings** called for the purpose of meeting with union organizers and the taking of ballots expressing their choice." (Emphasis ours.)

This statement of the Court is fully sustained by all the evidence in the case. The Court's reference, therefore, in other portions of its decision to the so-called "unlawful purposes" of the petitioners is pure unsupported conclusion.

(3) *The findings of fact expressly affirm that the purpose and object of the lawful activities is to organize the bakery sales drivers by direct appeal to them and the truthful advertising of their nonunion status.*

It is to be noted that the first finding of fact made by the court below is as follows:

> "I approve and find as facts each and all of the facts set forth in that certain written stipulation entered into between the parties during the course of the trial."

Reference to that stipulation shows that, in so far as this branch of the argument is concerned, the Court has approved and found the following facts:

Since 1933 the petitioning Local No. 344 has "attempted

to organize the **bakery sales drivers** of the Carpenter Baking Company * * *" (R. 35, Stipulation of Facts, para. 1).

In September, 1938, Local No. 344 had several meetings with the **sales drivers** of the company "for the purpose of organizing them" (R. 34, Stip., para. 4).

On January 13 and January 18, 1939, direct appeals were made by Local No. 344 to the **sales drivers** of the plaintiff company for the purpose of inducing them to join Local 344 (R. 40, 41, Stip., para. 11).

Since April 4, 1939, Local 344 "has continued its efforts to unionize the **bakery sales drivers**, and prior to August 12, 1940, it solicited individually such sales drivers on numerous occasions, and at least two meetings were held of the **sales drivers**, which meetings were called by Local 344" (R. 43, Stip., para. 17).

Letters were sent on June 6, 1939, on May 14, 1940, and on June 27, 1940, inviting the **sales drivers** to attend meetings conducted by the petitioners (R. 44, Stip., para. 18).

Meetings were held on May 16, 1940, and July 2, 1940, by Local 344, at which **sales drivers** of the plaintiff attended, and at which the benefits of membership in Local 344 were explained, and the **sales drivers** in attendance were invited to join such organization (R. 44, 45; Stip. para. 19).

On April 9, 1940, and again on July 23, 1940, the union took formal action with respect to advertising the status of the Carpenter **sales drivers** who were not members of Local 344 in order to get them to join, and for the purpose of raising funds "for the duration of the controversy with the M. Carpenter Baking Company **sales drivers**" (R. 45, 46, 140; Stip. 20).

The activities presently carried on are for the purpose of persuading people to refrain from purchasing bakery

products offered for sale by the "Carpenter Baking Company **sales drivers who were not members of Local 344.**" The petitioners have applied enonomic pressure for the purpose of persuading such sales drivers to become members of the union (R. 53; Stip. para. 27).

In addition to the above there is the uncontradicted testimony in the record that the activities were directed solely to the drivers, as well as the uncontradicted testimony that those employees of the company who were members of the union were not picketed (R. 27).

The trial court in its decision referred to the activity as being directed "* * * to the end that they (the sales drivers) will become members of the union * * *" (R. 22).

In view of these findings of fact made by the lower court, it must be obvious that any purported finding contained in paragraphs 7 and 13 of the findings of fact, that such activities were directed at the company or that such activities were for the purpose of coercing the company to violate any laws of the state, are pure conclusions, unsupported by and contrary to fact, and are attributable only to the lower court's having confused the results of such activities with the purpose and objective of such activities and the means employed.

Certainly the express findings of fact made by the Court must be deemed to be controlling if there is any question whatsoever.

(4) *The remaining findings are hopelessly confused and are chiefly conclusions, and unwarranted and unsupported inferences. They do no support any judgment alleged to be based upon a finding that the activities are for an illegal purpose.*

The seventh finding of fact is in truth a conclusion of law (R. 26). The first clause therein relates to coercion and

intimidation without setting forth the specific acts which presumably constitute such coercion and intimidation.

Since the record indicates that the union engaged only in peaceful picketing, this finding is tantamount to a finding that the peaceful picketing constituted coercion and intimidation.

As we have already seen, peaceful and truthful picketing is an exercise of free speech, and a constitutional guarantee thereof cannot be evaded by the process of labeling such conduct by the epithets "coercive" or "intimidatory."

The second clause in such finding refers to the petitioners "exerting economic pressure upon plaintiff's employees, as well as upon customers of the plaintiff solicited by such employees," and goes on to state that such pressure was intended to coerce, intimidate and induce the employer to interfere with the employees in the exercise of their rights, and to coerce its employees to designate the union as the collective bargaining representative.

Here again we have the Court confusing the **result** of conduct with the **means** employed and the purpose. No place in the record is there any intimation that the conduct was directed to any purpose other than to secure the membership of the employees. There is no place in the record a scintilla of credible, competent evidence, or, for that matter, evidence of any kind which controverted the testimony of these petitioners as to the purpose of their activities.

This purported finding of fact, which is only a conclusion, is merely the opinion of the court below that any time an employer loses business because of the nonunion status of his employees such employer is being coerced to interfere with his employees' rights to join or not to join a labor organization.

This theory of the Court must necessarily be based upon

the assumption that the employer is desirous of violating or will violate the law to escape the results of the legitimate activities of the organization. The Court has no right to indulge in such assumption.

In any event, the damages sustained by the employer are not caused by any illegal conduct to attain an illegal object. They are, therefore, damnum absque injuria, and the employer is no more entitled to an injunction than would be the flour manufacturers, who also are damaged by the reduction in the employer's business.

The employer cannot do for the employees what the employees cannot do themselves. Since it is clear that the employees are not entitled to an injunction, certainly the employer may not perform that service for them.

It must be noted that no place in the record is there any intimation that any force, threats, coercion or intimidation were exercised upon the company, the company's employees, or its customers. If, therefore, any of the customers of the nonunion employees refused to continue to patronize such employees, such refusal was attributable to a number of factors: (a) Sympathy with the union and its cause, and (b) a desire to retain the patronage of those who were sympathetic to the union and its cause.

The loss of patronage, therefore, was due only to peaceful persuasion and not because of any unlawful or illegal activities on the part of the defendants. Yet the court below emphasizes this loss of patronage as the result of peaceful persuasion, and refers to it as though it is the result which places the stamp of illegality upon the conduct of the petitioners.

(5) *Constitutional liberties may not be restrained by insubstantial or spurious findings of fact.*

Pertinent on this branch of the argument is the statement of this Court in the case of **Milk Wagon Drivers**

Union of Chicago, Local 753, et al. v. Meadowmoor Dairies, Inc., 312 U. S. 287:

> **"They (the state courts) must act in subordination to the duty of this Court to enforce constitutional liberties even when denied through spurious findings of fact in a state court."**

This Court in that case also stated:

> **"Still it is of prime importance that no constitutional freedom, least of all the guaranties of the bill of rights, be defeated by insubstantial findings of fact screening reality."**

It is patently clear that any purported finding that the peaceful activities engaged in by petitioners are not directed to any legal proven objective is unsupported by the record. Any purported finding to such effect is truly a "spurious" finding and should not be credited by this Court.

III.

The Restraining Order Contained in the Judgment Prohibits and Restrains Petitioners From Exercising Rights Guaranteed by the Fourteenth Amendment to the Constitution of the United States, Is Improperly Directed to Activities Which Have Not Been Engaged in, Is Unnecessarily Broad and Comprehensive, and Is Indefinite, Vague and Uncertain, Requiring Petitioners to Act at Their Peril.

It is fundamental, of course, that injunctions are not issued unless there has been a course of illegal conduct and a reasonable expectation that such conduct will continue unless restrained. **Express Publishing Co. v. N. L. R. B.**, 312 U. S. 420.

It is also fundamental that such injunction, when issued, must be reasonably definite and certain so that those to

whom it is directed are fully aware what conduct is prohibited at the peril of contempt **(Restatement, Law of Torts**, Vol. IV, Para. 813-816).

(A) **Paragraph one of the injunction is not directed to any unlawful acts committed by petitioners.**

Bearing these principles in mind, we find that under paragraph 1 of the judgment petitioners are restrained from engaging in any course of conduct which is "reasonably calculated to coerce and intimidate respondent's employees." We have already pointed out that there is no basis for any finding that the peaceful activities of these petitioners are coercive or intimidatory. That provision of the injunction, therefore, is not directed to any existing unlawful act which may be reasonably anticipated to be continued in the future.

This particular provision of the injunction can be responsive only to the lower court's holding that the peaceful activities engaged in in the instant case are coercive or intimidatory. Since such finding of the Court is erroneous in fact and in law, the restraining order is similarly erroneous and cannot stand.

(B) **There is no basis in law for that part of the order which enjoins the following of trucks driven by respondents' employees.**

No finding was made by the Court that following of the trucks is unlawful or improper, unless it can be said that the violations of law on the part of the nonunion employees to escape being followed may be attributed to the petitioners.

The purpose of following the trucks is obvious. It is to enable picketing at the place and time when it is most effective, that is, at the point where the driver seeks to make his commission sales, and at a time when such driver is actually seeking to make such sale.

A firm such as the Carpenter Baking Company has hundreds of retail outlets in the City of Milwaukee. The union could have, had it wanted to, posted a picket in front of the most important of such outlets, advertising the nonunion status of the Carpenter employee making the delivery, and keep such picket posted there during the entire period that the store was open. Instead of adopting such method, however, the organization decided, for purposes of economy and efficiency, to advertise the facts only at such time as nonunion employees were actually seeking to make a sale or delivery.

The following of the truck, therefore, was not for the purpose of annoying, harassing or keeping under surveillance the activities of the nonunion driver, but merely to ascertain the next stop and to be present at the time such stop was made. The picket cars carried no signs or insignia of any kind. There was no indication, in so far as the public was concerned, that the truck driver was being followed. There was no attempt or effort on the part of those driving the picket cars to cause or compel any traffic violations.

There is testimony in the record that on occasions drivers who were followed sought to elude the pickets.

According to the testimony of Mr. McCully, one of the vice-presidents of the Carpenter Baking Company, there was no necessity that the drivers turn into alleys, but they could have gone ahead if they so desired (R. 82). Mr. McCully stated that he knew that the reason for trying to elude the following automobiles was to prevent the picketing in front of the store upon making the delivery (R. 82).

All that we have in the instant case, therefore, is a desire on the part of the nonunion employees to escape being so designated at the time of making their deliveries. In order to escape this designation they may have created

traffic hazards in very few instances. This certainly cannot be attributed to the union, nor can it be deemed an illegal or unlawful act of the union. One might as well argue that all activities of labor organizations must be enjoined if those against whom such activities are directed may foolishly engage in illegal or unlawful conduct for the purpose of escaping whatever burden such activities placed upon them.

If the activities of the petitioners were such that human life and property would be endangered; if this case involved reckless pursuit or persistent "dogging," which created on the part of the petitioners traffic hazards and dangers; or if we had here a case of abuse of the streets, then the Court might very well have enjoined such unlawful activities.

The record in the instant case shows, however, that from two to six automobiles were used in this activity, covering the entire area of the County of Milwaukee; that such automobiles always remained two or three car lengths behind the nonunion employees' truck; that no laws were violated by the following automobiles; that no damage was ever done.

It must also be noted here that there was no spirit of antagonism or animosity between the employees. The spirit of friendliness prevailed to such an extent that on occasions the nonunion employees and the representatives of the union would have lunch together or even engage in social calls during the evening (C. 60, 65, 86). There was, therefore, nothing malicious in the following of the truck. There was no persecution or the invasion of privacy. The nonunion driver may have, on occasion, sought to elude the follower so that he might succeed in making a delivery and sale before the customer was aware of his nonunion status, but certainly the union is not chargeable with any unlawful conduct voluntarily engaged in by the nonunion employee.

Under such circumstances it is preposterous to prohibit the union from adopting the one certain device which enables it to be present at a time when its statements to the public could be most effective in helping win its case.

The victim of an assault cannot be held guilty of the crime on the ground that the assailant's dislike for him was the cause of the crime.

Nor should the petitioners here be restrained in the legitimate and peaceful exercise of its rights because of the dissatisfaction of others with the result of the exercise of such rights. **Thornhill v. Alabama,** 310 U. S. 88.

(C) **Paragraph 3 of the restraining order is in flat violation of the constitutional rights of these petitioners.**

Paragraph 3 of the restraining order provides that the defendants and each of them, their officers, agents, servants and employees, be enjoined and restrained

> "(3) From inciting or attempting to persuade persons not to deal with the plaintiff or the plaintiff's employees or with retail dealers offering plaintiff's products for sale."

There is no limitation contained in this restraint on either the nature, the time, the place or the manner of the prohibited persuasion. It is all inclusive and embraces every possible and conceivable means available to the petitioners to present their views, their opinions and the facts relating to their controversy with the employees of the respondent, whether by placard, sign, newspaper, radio, or direct entreaty. It includes every normal and proper activity of labor organizations.

While this provision does not refer specifically to picketing or boycotting, it is obviously responsive to the findings which detail the activities engaged in by petitioners.

Under the **Thornhill, Carlson** and **Swing** cases, this provision constitutes a flat violation of the Fourteenth Amendment to the Constitution of the United States, regardless of whether such provision is based upon statute or otherwise. Any statute which purportedly will justify such provisions in a restraining order under the facts of this case would be clearly unconstitutional. **Thornhill v. Alabama**, supra. Any judgment of a court restraining such activities would clearly deny to petitioners rights, privileges and immunities afforded to them under the Fourteenth Amendment to the Constitution of the United States.

(D) **Paragraph 4 of the restraining order restrains petitioners from "(4) otherwise intentionally molesting, injuring or interfering with the plaintiff in its business." This is much too broad, indefinite and is responsive to no facts in the instant case.**

This paragraph apparently and obviously is designed as a general "catch-all" for the purpose of including within the scope of the injunction any activities which had not been specifically referred to in the previous provisions of the injunction.

Note, first, that there is nothing in the record which will sustain a finding of such intentional molestation, injuring or interfering, and note, secondly, that this paragraph, too, includes every possible and conceivable type of conduct which the ~~defendant organization~~ might engage in while pursuing their legitimate objectives. General language of this kind has been repeatedly criticized by the courts in labor as well as in nonlabor cases.

The use of the term "interference" has come before the courts in labor controversies before. In days of the broad, sweeping injunctions, which, unfortunately, are not yet en-

tirely things of the past, it was common to prohibit "interference in any way" or "unlawful interference," etc. Many appellate courts, in reviewing such injunctions, were quick to modify them.

In the case of **King v. Weiss and Lesh Manufacturing Company,** 266 Fed. 257, at 259, the Court modified an injunction containing the use of the words "all unlawful interference," because "it leaves the door open for controversy both as to what is 'interference' and what is 'unlawful interference.' "

For similar holdings see **Pierce v. Stablemen's Union,** 156 Cal. 70; **Michaels v. Herman,** 111 Misc. (N. Y.) 284, 286; **Wyckoff Amusement Company, Inc., v. Kaplan,** 183 App. Div. (N. Y.) 205, holding that injunctions using expressions such as "interference in any way" and "in any wise interfering" are too broad, indefinite, or too inclusive, to permit those against whom issued to be apprised of the particular conduct forbidden. **Bittner v. West Virginia-Pittsburgh Coal Company,** 15 Fed. (2d) 652; **Lisse v. Local Union,** 24 Pac. (2d) 833 (Calif.), affd. 41 P. (2d) 314; **Restatement of Law on Torts,** Volume 4, paragraph 816; **Grassi Contracting Co. v. Bennett,** 160 N. Y. Supp. 279; **American Federation of Labor v. Buck's Stove & Range Co.,** 33 App. D. C. 83; **Mills v. United States Printing Co.,** 91 N. Y. Supp. 185; **Gray v. Building Trades Council,** 97 N. W. 663, 1119 (Minn.); **Green v. Samuelson,** 178 A. 109.

In **Walton Lunch Co. v. Kearney,** 236 Mass. 3010, 128 N. E. 429, it was held that forms of interference with the plaintiff's rights, which are not found to have been practiced or threatened, are not rightfully included within terms of an injunction.

In **Robison v. Hotel & Restaurant Employees Local 782,** 207 Pac. 132 (Idaho), it was held that "there was no occasion to enjoin the use of force or violence, since none had

been used or was threatened. The injunction should not require the appellants to absolutely desist or refrain from in any manner interfering with the business of respondents. Neither should it include every species of expostulation or entreaty."

In **International Pocket Book Workers Union v. Orlove,** 158 Md. 496, 148 A. 826, it was stated that the injunction should be couched in language sufficiently definite to inform the strikers with reasonable clarity to what extent they could carry on picketing activities.

The entire question of the scope of the labor injunctions and their enforcement is discussed in the book **The Labor Injunction,** written by Felix Frankfurter (now Justice Frankfurter) and Nathan Greene, and published in 1930 by MacMillan Company. At pages 105 through 122, and in the footnotes thereto, there are given many and detailed examples of instances in which injunctions were modified by appellate courts and the particulars in which such injunctions were modified. After giving many examples and citing many cases the authors state:

> "Some courts have been alert to mitigate these difficulties. They began by ordering modification of decrees whose phrasing might cover lawful activities or purely hypothetical conduct. If by the term 'persuasion' duress is intended, duress and not persuasion should be restrained; if under cover of picketing, violence is used, violence, not picketing, should be enjoined. For, 'the vice of the injunctive order lies in the fact that this word, unqualified, may signify a lawful act.'"
>
> • • • • • • •
>
> "More recently, courts have felt the need of giving affirmative indications that their decrees were not means to paralyze all those activities which alone give validity to the abstract right to strike" (pp. 115-117).

There will be found in Volume IV of the **Restatement of**

the Law of Torts, paragraph 815, an excellent and concise statement of the rules to be followed in drafting an injunction. Pertinent herein is the comment at page 180, which reads as follows:

> "c. **Specificity of decree.** An injunctive decree in a labor dispute should inform the defendants as to the conduct which it prohibits. It cannot describe all the conduct in the most minute detail; but it should be as informative as practicable. Provisions restraining defendants from 'unlawfully interfering with' the conduct of the plaintiff's business, or from inducing 'by unlawful means' third persons not to deal with the plaintiff, or from 'resorting to any species of threats' against the plaintiff's customers, without specifying the things threatened, or from 'in any manner whatsoever impeding or interfering with' the conduct of the plaintiff's business, or from 'doing all unlawful acts described in the bill of complaint and the affidavits attached thereto,' do nothing more than command the defendants to obey the law and add nothing to the mandate by which the defendants are bound before the issuance of the decree. Such provisions are inappropriate in a labor injunction. **Workers cannot be expected to obtain from general commands a reasonably clear idea of specific acts which they are restrained from doing.**" (Emphasis ours.)

Note that the injunction in the instant case is clearly contrary to the **Restatement.** (See, also, the provisions of paragraph 816 of the Restatement.)

See, also, **Express Publishing Co. v. N. L. R. B.**, 312 U. S. 420.

Examination of the above authorities clearly demonstrates that the injunction herein is not only so broad as to include all conceivable exercises of constitutional rights, but is so indefinite and vague that the petitioners are not accurately or adequately advised as to what conduct is and

what conduct is not permissible. The injunction cannot stand under the cases already referred to. If permitted to stand, however, it must certainly be modified so as to at least have the attributes of definiteness and clarity, and must be limited to illegal acts reasonably anticipated to occur in the future.

IV.

The Injunction Entered Herein Cannot Be Justified on the Basis of Any Purported Violation of Section 343.681, Statutes 1939.

The complaint in the instant case alleged violation of Section 343.681 of the Wisconsin Statutes, making it a crime for two or more persons to combine together for the purpose of willfully or maliciously injuring another in his business by any means whatever.

Neither the decision of the Court, the findings of fact, nor the conclusions of law, assert a violation of this statute. Anticipating the possibility, however, that the application of this statute might be urged before this Court, we dismiss its applicability summarily.

Previously the same statute was discussed by this Court in the case of **Aikins v. Wisconsin,** 195 U. S. 154, at 158. In that case it was pointed out that the statute is applicable only where the intent of the activities is to cause malicious injury "* * * if for the sake of the harm as an end in itself and not merely as a means to some further end legitimately desired * * *." Similarly, it was held in the case of **Iron Moulders Union v. Allis-Chalmers** (Wis.), 166 Fed. 45, that a strike carried on by working men did not constitute a willful conspiracy within that section.

There can be no question in the instant case concerning the objective of the petitioners. There is no evidence, nor

is there a finding that the activities were carried on maliciously for the purpose of inflicting injury as an end in itself. Injury may have been sustained, but that was merely a result of lawful conduct directed to a lawful end, and, as stated in the case of **Senn v. Tile Layers' Protective Union**, 222 Wis. 383, "* * * the injury is incidental, injuria absque damno." See, also, the opinion of the United States Supreme Court affirming this case, 301 U. S. 468.

It is, therefore, respectfully submitted that section 343.681 has no application and no bearing upon the issues in this case.

CONCLUSION.

We have argued in the course of this brief many points, each of which standing alone, in our opinion, is sufficient to result in reversal of the lower court's decision. We shall not repeat those points here.

The basic issue can be stated simply in the following words: Have the petitioners in the instant case engaged in lawful activities directed to a legitimate purpose?

With respect to the means employed the decisions of the United States Supreme Court in the **Thornhill**, **Carlson** and **Swing** cases are conclusive upon such point. The means employed here constituted the exercise of the right of free speech under the Constitution of the United States.

The end sought by the unions under the uncontradicted testimony and findings of fact made by the court below is the unionization of those employees who have not yet joined the ~~defendant~~ union. The lawful means were directed solely and exclusively to this legitimate end. The union is seeking by lawful means to persuade the nonunion employees to join with their coemployees at their

own plant and at the rest of the major baking plants in the City of Milwaukee so that their organization may be made more effective.

As pointed out in the **Thornhill** and **Swing** cases the right of labor to disseminate information is not limited to certain types of controversies. Labor has the right to convey to the public information concerning the nonunion status of employees, regardless of whether such employees are nonunion because of their own volition or because they have been intimidated or coerced into refusing membership in such organization. In either event their nonunion status is of vital importance to the public and to the entire industry, as was correctly pointed out in the **Thornhill** case:

> "It is recognized now that satisfactory hours and wages and working conditions **in industry and a bargaining position which makes these possible** have an importance which is not less than the interests of those in the business or industry directly concerned. The health of the present generation and of those as yet unborn may depend on these matters, **and the practices in a single factory may have economic repercussions upon a whole region** and affect widespread systems of marketing. The merest glance at state and federal legislation on the subject demonstrates the force of the argument that labor relations are not matters of mere local or private concern. **Free discussion concerning the conditions in industry and the causes of labor disputes appears to us indispensable to the effective and intelligent use of the processes of popular government to shape the destiny of modern industrial society.**" (Emphasis ours.)

The injunction issued by the court below, reduced to its simplest terms, prevents such lawful activity for a legitimate end. It cannot be sustained on any ground.

It is, therefore, respectfully submitted that the judg-

ment appealed from be reversed, so that these petitioners may be permitted to exercise such rights which are assured to them by the Constitution of the State of Wisconsin and the Constitution of the United States, without fear of restraint and punishment.

Respectfully submitted,

JOS. A. PADWAY and
A. G. GOLDBERG,
Attorneys for Petitioners.

APPENDIX A.

State of Wisconsin.

In Supreme Court.

January Term, 1941.

No. 151.

Carpenter Baking Co., a corporation,
Respondent,
vs.
Bakery Sales Drivers Local Union No. 344 (A. F. of L.) et al.,
Appellants.

Appeal from a judgment of the Circuit Court for Milwaukee County, Wm. F. Shaughnessy, Circuit Court. **Affirmed.**

Action by Carpenter Baking Company, a corporation, plaintiff, against Bakery Sales Drivers Local Union No. 344, Auto Truck Drivers Joint Council No. 50, Elmer Johnson, Joseph Reichartz, Gilbert Schlechta and G. McMicken, defendants, commenced on August 15, 1940, to restrain defendants from conduct calculated to coerce and intimidate plaintiff's employees; from following plaintiff's employees and delivery trucks while the trucks were being used to deliver bakery products to customers, and from inciting and attempting to persuade persons not to deal with plaintiff or plaintiff's employees. The complaint alleged that plaintiff's employees are engaged in the sale and delivery of its products; have refused to designate defendant Bakery Sales Drivers Local Union No. 344 as bargaining representative; that no labor dispute exists between plaintiff and its employees; that defendants entered a conspiracy

contrary to the provisions of Sec. 343.681, Stats., to injure plaintiff's trade and business for the purpose of compelling plaintiff to coerce its employees to become members of defendant unions. The complaint alleges that in furtherance of the conspiracy defendants in cars followed the delivery trucks of plaintiff and sought to dissuade plaintiff's customers from purchasing bakery products sold by plaintiff's employees on the ground that the employee was not a member of defendant unions. The answer alleged that plaintiff had engaged in conduct which was in violation of the National Labor Relations Act and had been found guilty of such conduct by an intermediate report of an examiner of the National Labor Relations Board after public hearing. The answer further set forth that the conduct of defendants was merely a peaceful and truthful advertisement of the fact that plaintiff's employees were not members of the defendant Bakery Sales Drivers Union. Defendants further set up that in so far as any of defendants' actions are violations of Chapter 111 and Sections 103.535 and 103.62 (3), Stats., these statutes are unconstitutional and void; that assuming that they are not, Chapters 111 and 103, Stats., are inapplicable because plaintiff is engaged in interstate commerce and plaintiff does not come into court with clean hands and is entitled to no relief.

The case was tried to the court largely upon a stipulation of facts, and the Court duly made and entered findings of fact and conclusions of law in which it held that conduct of defendants constituting a violation of sec. 111.06 (a) (b) (e) and (f). Judgment was entered on December 16, 1940, in accordance with the findings and conclusions, and defendants were restrained from adopting means and engaging in conduct intended and reasonably claimed to coerce and intimidate plaintiff's employees from following plaintiff's employees' delivery trucks while the trucks were being used to deliver products to plaintiff's

customers; from inciting or attempting to persuade persons not to deal with plaintiff or plaintiff's employees, or with retail dealers offering plaintiff's products for sale; from otherwise intentionally molesting plaintiff or interfering with its business. Defendants appeal.

Per Curiam. Upon this appeal Mr. Justice Fowler, Mr. Justice Fairchild and Mr. Justice Martin are of the opinion that the judgment should be affirmed. Mr. Chief Justice Rosenberry, Mr. Justice Fritz and Mr. Justice Wickhem are of the view that the judgment should be reversed. This situation necessarily results in affirmance of the judgment appealed from. Zohrlaut v. Mengelberg, 148 Wis. 592, 134 N. W. 1135.

Judgment affirmed.

The following memorandum was filed October 7, 1941:

Per Curiam (on motion for rehearing). Mr. Justice Fowler, Mr. Justice Fairchild and Mr. Justice Martin are of the view that the findings of fact of the lower court are not against the clear weight and preponderance of the evidence. Mr. Chief Justice Rosenberry, Mr. Justice Fritz and Mr. Justice Wickhem are of the contrary view.

The motion for a rehearing is denied with $25 costs.

No. 844

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In the Supreme Court of the United States

October Term, 1941

BAKERY SALES DRIVERS LOCAL UNION No. 344 (A. F. of L.), AUTO TRUCK DRIVERS JOINT COUNCIL No. 50 (A. F. of L.), ELMER JOHNSON, JOSEPH REICHARTZ, GILBERT SCHLECHTA and G. McMICKEN,

Petitioners,

vs.

CARPENTER BAKING COMPANY, a Corporation,

Respondent.

Brief Opposing the Issuance of a Writ of Certiorari

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In the Supreme Court of the United States

October Term, 1941

No. 844

BAKERY SALES DRIVERS LOCAL UNION No. 344 (A. F. of L.), AUTO TRUCK DRIVERS JOINT COUNCIL No. 50 (A. F. of L.), ELMER JOHNSON, JOSEPH REICHARTZ, GILBERT SCHLECHTA and G. McMICKEN,

Petitioners,

vs.

CARPENTER BAKING COMPANY, a Corporation,

Respondent.

Brief Opposing the Issuance of a Writ of Certiorari

THE PRINCIPAL QUESTION PRESENTED IN PETITIONERS' BRIEF HAS BECOME MOOT.

In petitioners' brief under the title *"Questions Presented,"* the principal question set forth is as follows:

> "1. Is Wisconsin's so-called 'Peace Act,' particularly Section 111.06 (2) (e), prohibiting employees in a bargaining unit from peaceful picketing or boycotting in connection with a strike, unless a majority in such unit have authorized the

strike, void as contrary to the Fourteenth Amendment, depriving petitioners of the right to free speech and denying the equal protection of the laws?"

We contend that this is no longer an issue in the case. It has become a moot question. On May 16, 1940 only three of respondent's employes were members of the union (R. 45). On December 16, 1940, at the time of the entry of the judgment, there were not in excess of eight of the respondent's employes who were members of the union (R. 54). At the time of the trial the respondent had a total of twenty-eight employes who were eligible for membership in Local 344 (R. 45). Subsequent to the entry of judgment in this case the union (Local 344) received into its membership more than a majority of respondent's employes.

On the first day of April, 1941, a written contract was entered into between the respondent and Local 344 wherein the respondent expressly recognized Local 344 "as the sole collective bargaining agent for all truck drivers in its employ during the term of the contract". The contract also provided that it "shall remain in full force and effect to November 1, 1941". A copy of this contract is included in the affidavit set forth in Appendix A annexed to this brief.

On November 5, 1941, John E. Johnson, Regional Director for National Labor Relations Board, forwarded a letter to the respondent making inquiry concerning the relationship between the respondent and Local 344, and on November 11th a letter was forwarded on behalf of respondent to John E. Johnson, Regional Director, National Labor Relations Board, in response to said inquiry, which letter among other statements contained the following:

"Since the signing of the contract the Carpenter Baking Company has at all times recognized and still recognizes Bakery Sales Drivers Local No. 344 (A. F. of L.) as the sole collective bargaining agent for truck drivers in the employ of the Company. The Company stands ready and willing to negotiate with this Union at all times and upon all subjects that are a proper matter for negotiation."

In response to the foregoing letter John E. Johnson, Regional Director, National Labor Relations Board, on December 9, 1941, addressed a letter to the attorneys for respondent reading as follows:

"Gentlemen:

This is to advise you that the question of representation raised by the petition in the above matter has been adjusted.

Very truly yours,

(signed) JOHN E. JOHNSON,
Regional Director."

(Material portions of the foregoing letters are set forth in the affidavit annexed to this brief as Appendix A.)

QUESTIONS PRESENTED THAT ARE NOT MOOT.

Are the following statutory provisions constitutional?

"*111.04 Rights of employes.* Employes shall have the right of self-organization and the right to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in lawful, concerted activities for the purpose of collective bargaining or other

mutual aid or protection; and such employes shall also have the right to refrain from any or all of such activities."

"*111.06 What are unfair labor practices?* (1) It shall be an unfair labor practice for an employer individually or in concert with others:

(a) To interfere with, restrain or coerce his employes in the exercise of the rights guaranteed in section 111.04.

* * * * * *

(2) It shall be an unfair labor practice for an employe individually or in concert with others:

(a) To coerce or intimidate an employe in the enjoyment of his legal rights, including those guaranteed in section 111.04, or to intimidate his family, picket his domicile, or injure the person or property of such employe or his family.

(b) To coerce, intimidate or induce any employer to interfere with any of his employes in the enjoyment of their legal rights, including those guaranteed in section 111.04, or to engage in any practice with regard to his employes which would constitute an unfair labor practice if undertaken by him on his own initiative.

* * * * * *

(3) It shall be an unfair labor practice for any person to do or cause to be done on behalf of or in the interest of employers or employes, or in connection with or to influence the outcome of any controversy as to employment relations any act prohibited by subsections (1) and (2) of this section."

STATEMENT OF THE CASE.

Stated in chronological order, the pertinent facts as shown by the record are as follows:

1. In December, 1938, Local 344 demanded that the respondent, Carpenter Baking Company, sign a closed shop agreement (R. 36, 37). At the time this demand was made not a single employe of the Carpenter Baking Company belonged to either Local 344 or Joint Council No. 50 (R. 38). The contract which Local 344 demanded from the respondent required the respondent to discharge any of its employes who refused to join the union (R. 37). The respondent informed the petitioners that it had concluded it could not properly force its employes to join the union and for that reason it was impossible for it to sign the contract (R. 37). Thereupon Local 344 informed the respondent that the union "would be compelled to *exert economic pressure against the company*" in order to secure union membership of the employes.

2. On January 13, 1939, at the request of Local 344, a meeting was held of the respondent's employes, and representatives of Local 344 addressed the meeting. After such addresses by the union representatives the employes voted unanimously against affiliating with the union (R. 40).

3. On the morning of January 16, 1939, Local 344 placed pickets about the respondent's plant. The pickets carried signs stating that the Carpenter Baking Company was "unfair to organized labor" (R. 40).

4. On January 18, 1939, a meeting of all of respondent's bakery sales drivers was held at the offices of the State Labor Board in Milwaukee and all such employes again voted unanimously against affiliating with Local 344.

5. On or about January 23, 1939, the Carpenter Baking Company plant was closed and remained closed until after the passage of the so-called Catlin Act. The plant reopened on April 4, 1939 (R. 41).

6. During the month of June, 1939, Auto Truck Drivers Joint Council No. 50 (A. F. of L.) preferred charges against the Carpenter Baking Company before the National Labor Relations Board.

7. On June 8, 1939, George J. Ritchey, treasurer and business manager of Joint Council No. 50, forwarded a letter to all of the Carpenter Baking Company employes in which he informed them that until June 12, 1939 they could join the union by paying an initiation fee of $7.50 per person, but that after that date the fee would be $100.00 per person (R. 55).

8. On April 29, 1940, petitioner Johnson, who is the business manager for Local 344, telephoned Mr. T. E. McCully, vice-president of the respondent company, and requested a conference with him. The conference was held at the Schroeder Hotel on April 30, 1940 (R. 44). At the conference Mr. Johnson made the following statement to Mr. McCully:

> "I am going to hold a meeting of your men probably at the Maryland Hotel and give them another chance to join up and if they don't, I am going to start and picket your bakery and also have men follow your salesmen and have them picket the stores that they serve. * * * We will put a campaign against you the same as we are against Golden Guernsey." (See Exhibit "F" in trial court, R. 81-84)

9. Prior to May 16, 1940, petitioner Johnson forwarded a letter to all of the respondent company's bakery sales

drivers and requested them to attend a meeting at the Maryland Hotel. The meeting was held on May 16, 1940 in accordance with the written notice and Mr. Johnson addressed the meeting, explaining the benefits of union membership.

10. On July 2, 1940, a similar meeting was held pursuant to written notice which was forwarded to all of the Carpenter Baking Company's sales drivers. The written notice stated:

> "This will be the final meeting for the organization of the Carpenter Baking Company drivers."

11. On August 12, 1940, the petitioners began the picketing activities described in respondent's complaint (R. 71).

On the trial petitioner Elmer Johnson, business manager of Local 344, testified as follows:

> "The activities that were commenced on August 12th were to reduce the sales of those sales drivers. We knew this would result in economic loss to the drivers, and felt that it would be an incentive to the drivers to join the union." (R. 71)
>
> "We wanted to reduce their sales to cut down their earnings." (R. 71)
>
> "I myself followed quite a few of the trucks." (R. 72)
>
> "I am personally acquainted with all the truck drivers of the Carpenter Baking Company." (R. 72)
>
> "I know 80 per cent of them by their first names. I know Mr. Hoff. I have followed Mr. Hoff on his route since August 12, 1940." (R. 72)

Petitioner McMicken, one of the pickets, testified upon the trial as follows:

"Q. You were trying to cut his (bakery sales driver's) pay check down?

A. Naturally.

Q. You thought by doing that you could force him to join the Union?

A. Not force him; make him see the light.

Q. You thought if you could hit a man's pocketbook, that would bring a light to him, is that right?

A. Sure." (R. 57)

"Q. They (the bakery sales drivers) would scoot down alleys and so on, trying to get away from you?

A. Yes." (R. 58)

"Q. While you were engaged in this activity, did any Carpenter sales driver jump a light or go through a red light?

A. I wouldn't say 'jump.' He went through seventy-five miles an hour or better." (R. 61)

"Q. Mr. Paulsen asked you whether some of the men, Carpenter sales drivers, didn't park their car so as to create a traffic hazard, and I believe you testified they did.

A. Right." (R. 61)

"Q. Did I understand you to say they went through at seventy-five miles an hour?

A. Yes.

Q. On how many occasions did you see them go through at seventy-five miles an hour?

A. I had three occasions of that. I remember that very distinctly because I remarked to the man with me. 'That guy is crazy to do that'." (R. 62)

Hudson Alofs, a student at the Milwaukee State Teachers College, testified that he was a rider who accompanied one of the sales drivers during the picketing activities. He

testified concerning the hazardous traffic conditions while being followed by the union automobile, as follows:

> "We eluded the pickets' car by a number of methods. On one day our driver drove parallel with a street car along the street until near a corner, where there was a parked car. The last minute the truck sprang through the street car and the parked car and the picket car could not come through behind. On other days we eluded them by going back to the bakery, and sometimes taking another truck and going out another entrance. Occasionally we left them in traffic where the driver of the car following got to traffic signs and was left behind. We frequently made some stops if we could on alleys and side street stops so as not to have our truck on an important street. We didn't want so many people to see us if the pickets were following.
>
> The effect of the cars following the truck made the truck driver nervous. It is a nerve-wracking job when you have one eye looking through a rear-view mirror to see who is following you and see how close he is, and see if you can stop safely, and if you are worrying about losing stops, particularly when you are in a union neighborhood. These men work very hard." (R. 79, 80)

T. E. McCully, an employe of the respondent company, testified:

> "The union activities since August 12, 1940, have made it more difficult to market our products. A salesman should have a regular time to get to each stop. Due to the fact that he is trying to elude the pickets, he goes different ways. I have observed that

the activities make the men more nervous. I have observed that it has been more difficult for them to take care of their trade." (R. 81)

It is undisputed that from the 12th of August, 1940, until the opening of the trial on September 23, 1940, the respondent company sustained substantial losses due to the petitioners' picketing activities. During that period of time it is estimated that the loss of the respondent company exceeded "15% of its total volume of business" and that due to the activities many customers ceased to patronize the respondent (R. 48).

None of the respondent's employes have quit work or indulged in picketing activities. The wages and labor conditions of such employes have been better than in other plants (R. 52).

ARGUMENT.

I.

The law of Wisconsin relating to employer-employe relations as it existed prior to the 1939 legislative enactments.

Prior to 1939 the legislature enacted laws guaranteeing to employes the right to join labor unions and designate collective bargaining agents of their own choosing. The dominant purpose of these laws was to protect employes from the domination of their employers.

It finally became evident that the shield which the legislature had given the laboring man of Wisconsin as a means of protecting him in his encounters with his employer was being used as a weapon against him by labor unions and

professional labor organizers. The laboring man of Wisconsin soon discovered that the very act that freed him from the coercion and intimidation of his employer subjected him to the coercion and intimidation of a multitude of other designing persons. He came to the sad realization that "tyranny is the same, be it the tyranny of the monarch or the tyranny of the multitude, nay the tyranny of the latter is the greater because it is tyranny multiplied". He learned that his new-born freedom was like a mirage. He was told by zealous professional labor organizers that he must "join the union"; that every month he must pay the union as a means of keeping his job. If he refused to comply with the demand and informed the professional organizer that he was entirely satisfied with his employment conditions and that his employer was a man of unusually high character and ideals and had always paid him high wages and had been kind and considerate of his welfare, and that all of his co-employes were opposed to joining the union, he was threatened with the loss of his job and consequent inability to earn a livelihood for himself and his family. In the event he insisted upon his right to refrain from joining the union, the professional organizer called upon his employer and demanded that the employer sign an all-union contract—and this notwithstanding every employe was opposed to union membership. This type of contract required the employer to discharge any employe who refused to join. If the employer signed the contract the employe was forced to join or lose his job. If the employer objected to coercing his employes and refused to sign the contract, it invited destruction. The law gave the union the right to picket the employer and to proclaim to the world that the employer was "Unfair to Organized Labor".

American Furniture Co. vs. I. B. of T. C. & H. of A., 222 Wis. 338, 268 N. W. 250;
Senn vs. Tile Layers Protective Union, 301 U. S. 468, 81 L. ed. 1269;
Lauf vs. E. G. Shinner & Co., 303 U. S. 323, 82 L. ed. 872.

It became evident to the laboring man of Wisconsin that the law that freed him from the domination and control of his employer automatically subjected him to the domination and control of the union and its professional organizers. The law made it possible for a new oppressor to shackle him. It guaranteed to him the right to join the union. His right to refrain from joining the union was a mere mockery. His freedom of choice was gone. The tyranny of the multitude was upon him. He must submit or lose his daily bread. Moreover, his troubles were not at an end if he did submit. The law made it possible for a rival union to make demands upon him and his fellow-employes.

In the light of the law as it existed when the 1939 legislature convened, it is not surprising that the legislators were confronted by an aroused citizenry demanding that the right of an employe to voluntarily refrain from joining a union should be protected in the same manner as his right to join. Employers and employes alike urged the enactment of laws to secure this protection.

II.

The public policy of the State of Wisconsin is proclaimed by the "Employment Peace Act."

The Employment Peace Act (Chapter 57, Laws of 1939) clearly recognizes that there are three major interests in-

volved in every labor dispute, namely, the interest of the public, the interest of the employe, and the interest of the employer. It further recognizes that whatever the rights of the disputants with respect to each other in the controversy, they should not be permitted in the conduct of their controversy to intrude directly into the primary rights of third parties to earn a livelihood. The declaration of policy as set forth in the Employment Peace Act is contained in section 111.01. Among other provisions it contains the following:

"*111.01 Declaration of Policy.* The public policy of the state as to employment relations and collective bargaining, in the furtherance of which this chapter is enacted, is declared to be as follows:

(1) It recognizes that there are three major interests involved, namely: That of the public, the employe, and the employer. These three interests are to a considerable extent interrelated. It is the policy of the state to protect and promote each of these interests with due regard to the situation and to the rights of the others.

(2) Industrial peace, regular and adequate income for the employe, and uninterrupted production of goods and services are promotive of all of these interests. They are largely dependent upon the maintenance of fair, friendly and mutually satisfactory employment relations and the availability of suitable machinery for the peaceful adjustment of whatever controversies may arise. It is recognized that certain employers, including farmers and farmer co-operatives, in addition to their general employer problems, face special problems arising from perishable commodities and seasonal production which require adequate consideration. It is also

recognized that whatever may be the rights of disputants with respect to each other in any controversy regarding employment relations, they should not be permitted, in the conduct of their controversy, to intrude directly into the primary rights of third parties to earn a livelihood, transact business and engage in the ordinary affairs of life by any lawful means and free from molestation, interference, restraint or coercion.

* * * * * *

(4) * * * While limiting individual and group rights of aggression and defense, the state substitutes processes of justice for the more primitive methods of trial by combat."

III.

The 1939 legislative enactments guarantee to an employe:

1 — The right to join or refrain from joining a labor organization.

2 — The right to be free from the coercion or intimidation of fellow-employes or outside union members in respect to exercising his right to join or his right to refrain from joining a labor organization.

3 — The right to be free from the coercion or intimidation of his employer in respect to exercising his right to join or his right to refrain from joining a labor organization.

Section 111.04 W. S. 1939 became a part of the law of the State of Wisconsin through the enactment of the Employment Peace Act (Chapter 57, Laws of 1939). That statute provides as follows:

"*111.04 Rights of Employes.* Employes shall have the right of self-organization and the right to

form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in lawful concerted activities for the purpose of collective bargaining or other mutual aid or protection; and such employes shall also have the right to refrain from any or all of such activities."

The legislature realized that the rights of a laboring man to join or refrain from joining a labor organization needed to be safeguarded and protected. As a means of safeguarding and protecting this right the legislature expressly prohibited fellow-employes or outside members of labor unions from coercing or intimidating an employe to force him to join a labor union. The fellow-employes are prohibited from exercising such coercion or intimidation by subsection (2) (a) of section 111.06, and members of labor unions are prohibited from indulging in such coercion or intimidation by subsection (3) of section 111.06. Subsection (2) (a) of section 111.06 reads as follows:

"(2) It shall be an unfair labor practice for an employe individually or in concert with others:

(a) To coerce or intimidate an employe in the enjoyment of his legal rights, including those guaranteed in section 111.04, * * *"

Subsection (3) of section 111.06 provides:

"(3) It shall be an unfair labor practice for any person to do or cause to be done on behalf of or in the interest of employers or employes, or in connection with or to influence the outcome of any controversy as to employment relations any act prohibited by subsections (1) and (2) of this section."

Subsection (1) (a) of section 111.06 expressly prohibits an employer from interfering with, restraining, or coercing his employes in the exercise of their right to join or refrain from joining a labor organization. That statute reads as follows:

> "*111.06 What are unfair labor practices.* (1) It shall be an unfair labor practice for an employer individually or in concert with others:
>
> (a) To interfere with, restrain or coerce his employes in the exercise of the rights guaranteed in section 111.04."

It is apparent that at the time of the 1939 legislative enactments the legislature was well aware that professional labor organizers, upon failing to induce workingmen to join the unions voluntarily, had a practice of coercing and intimidating employers so that the employers would in turn force their employes to join the labor organization sponsored by the organizer.

The legislature was not content to merely protect the employe in the enjoyment of the rights guaranteed by section 111.04 from frontal attacks by fellow-employes, unions and employers. It concluded that the employe also needed protection from a flank or rear attack. It accordingly enacted subsection (2) (b) of section 111.06. That statute provides as follows:

> "(2) It shall be an unfair labor practice for an employe individually or in concert with others:
>
> • • • • • •
>
> (b) To coerce, intimidate or induce any employer to interfere with any of his employes in the enjoyment of their legal rights, including those guaranteed in section 111.04, or to engage in any prac-

tice with regard to his employes which would constitute an unfair labor practice if undertaken by him on his own initiative."

The petitioners contend that these statutes are unconstitutional. Is it beyond the power of the legislature to confer upon a workingman the right to refrain from affiliating with a labor union if he so chooses? If the enactment of such a statute is a proper exercise of legislative power, are we to assume that it is wrongful for the legislature to enact other statutes (similar to section 111.06) to safeguard and protect the employe in the enjoyment of the rights thus conferred upon him?

IV.

Concerted action of employes is unlawful if either the object or the means of the concerted action is improper.

The trial court found that the petitioners engaged in concerted action against the respondent company and intentionally inflicted damage upon the respondent for the purpose of coercing the respondent in order to compel it to force its employes to join the petitioners' union. The petitioners were attempting to force the respondent to commit an illegal act. They wanted the respondent to interfere with the right of its employes to refrain from joining a labor organization.

If the concerted action is carried on to accomplish an unlawful purpose it is quite immaterial that the means used consist of acts that are ordinarily regarded as lawful.

In *Duplex Printing Press Co. vs. Deering,* 254 U. S. 443, 65 L. ed. 349, the court declared:

> "The accepted definition of a conspiracy is, a combination of two or more persons by concerted action to accomplish a criminal or unlawful purpose, or to accomplish some purpose not in itself criminal or unlawful by criminal or unlawful means. *Pettibone vs. United States,* 148 U. S. 197, 203, 37 L. ed. 419, 422, 13 Sup. Ct. Rep. 542. If the purpose be unlawful it may not be carried out even by means that otherwise would be legal; and although the purpose be lawful, it may not be carried out by criminal or unlawful means." (p. 356)

In *Truax vs. Corrigan,* 257 U. S. 312, 66 L. ed. 254, it is stated:

> "Plaintiffs' business is a property right (Duplex Printing Press Co. vs. Deering, 254 U. S. 443, 465, 65 L. ed. 349, 356, 16 A. L. R. 196, 41 Sup. Ct. Rep. 172), and free access for employees, owner and customers, to his place of business, is incident to such right. Intentional injury caused to either right or both by a conspiracy is a tort. Concert of action is a conspiracy if its object is unlawful or if the means used are unlawful." (p. 260)

The Supreme Court of the State of Wisconsin in *Martens vs. Reilly,* 109 Wis. 464, 84 N. W. 840, declared:

> "It is a combination between two or more persons to do a criminal or an unlawful act or a lawful act by criminal or unlawful means. The word 'unlawful' is not confined to criminal acts. It includes all wilful, actionable violations of civil rights. In any case the object of the combination is what gives it legal significance." (p. 473)

It is well settled that acts when performed by a single individual may be lawful, but if they are performed by a group of individuals pursuant to a concerted plan, they may be unlawful. There is an excellent statement of the law on this subject in *Restatement of the Law of Torts,* Vol. 4, pages 94 and 95, as follows:

> "Concerted action by workers merely in making requests of employers, without threat of pressure to secure concession, causes no harm and is not actionable; but concerted action to enforce the requests necessarily involves pressure on the employer which may cause him financial loss or at least interfere with his freedom to operate his business as he likes. Such concerted action, then, necessarily involves the infliction of intentional harm. This was regarded as subjecting the workers to liability unless their conduct was justified; and this theory has prevailed. The development of the law in succeeding years has related to the issue of justification. Some objectives of concerted action and some methods of attaining those objectives which were at one time regarded as unjustified are now regarded as privileged.
>
> * * * * * *
>
> "Particularly in the case of labor combinations, the legal history has been that mere concert may make illegal or at least require justification for conduct in which individuals are free to engage without the requirement of justification when acting independently. Thus, even after an individual worker could withhold his services or custom from any person for any reason, a combination of workers under the same circumstances still required justification. Partly this was due to the fact that individual con-

duct in this sphere was not a problem, whereas concerted action was. Partly it was due to the obvious differences in power between action by individuals and action by combinations of individuals."

The fundamental rule relating to the right of a member of a labor union to indulge in concerted activities has been stated with simplicity and clarity by the American Law Institute in Vol. 4 of the *Restatement of the Law of Torts* as follows:

"Sec. 775. *Liability for concerted action by workers—general principle.*

Workers are privileged intentionally to cause harm to another by concerted action if the object and the means of their concerted action are proper; they are subject to liability to the other for harm so caused if either the object or the means of their concerted action is improper."

"Sec. 794. *Object prohibited by law.*

An act by an employer which would be a crime or a violation of a legislative enactment or contrary to defined public policy is not a proper object of concerted action against him by workers.

* * * The expression of public policy is not confined to legislation and criminal law; in passing upon the propriety of an object, public policy otherwised defined is an important factor. If the object is an act against which the law has definitely set its face, it is not a proper object of concerted action."

"Sec. 796. *Combination of objects.*

When workers engage in concerted action against an employer for more than one object and one or more of the objects are improper, their action is not for a proper object so long as they insist on the improper objects."

Briefly stated, opposing counsel's legal contentions may be set forth as follows: A labor union may indulge in peaceful picketing for the purpose of compelling an employer to violate the law. It is our contention that if it is admitted that the object or purpose of the picketing is unlawful, such picketing is also unlawful notwithstanding that it may be carried on in a peaceful manner. The *Restatement of the Law of Torts* (Sec. 796) recognizes that a labor union may have more than one objective—it may have an immediate objective and it may also have an ultimate objective. If the immediate objective is unlawful, peaceful picketing carried on to achieve that objective also becomes unlawful. The purpose of the picketing determines whether it is lawful or unlawful. This is in accord with the decision of this court in *Senn vs. Tile Layers Protective Union,* 301 U. S. 468, 81 L. ed. 1269. In that case Justice Brandeis, writing the majority opinion of the court, expressly recognized that both the means employed and the ends sought must be lawful. Speaking for the court, he declared:

"The judgment of the highest court of the state establishes that both the means employed and the end sought by the unions are legal under its law. The question for our determination is whether either the means or the end sought is forbidden by the Federal Constitution.

* * * * * *

"The statute provides that the picketing must be peaceful; and that term as used implies not only absence of violence, but absence of any unlawful act."

* * * * * *

"It follows, that if the end sought is constitutional—if the unions may constitutionally induce Senn to agree to refrain from exercising the right to work in his business with his own hands, their acts were lawful."

Justice Butler wrote the dissenting opinion of the court in that case. The only difference between the dissenting opinion and the majority opinion relates to the question as to whether the object sought by the union was a lawful one. It was recognized in both the majority and dissenting opinions that the object of the picketing must be a lawful one. Justice Butler declared:

"But strikes or peaceful picketing for unlawful purposes are beyond any lawful sanction. The object being unlawful, the means and end are alike condemned.

* * * * * *

"The object that defendants seek to attain is an unlawful one."

The Supreme Court of the State of Wisconsin recently gave very careful consideration to the statutes under consideration and analyzed them in connection with the review of the recent decisions of this court in *Wisconsin E. R. Board vs. Milk, etc., Union,* 238 Wis. 379, 299 N. W. 31. After commenting upon the decisions of this court in the *Carlson, Thornhill* and *Meadowmoor* cases, the Wisconsin Supreme Court declared:

> "With like reason may it be said that picketing which is unlawful is not justified on the ground that it is a proper exercise of the right of free speech."

In the case at bar the trial court found that the petitioners were attempting to force the respondent employer to violate the law. The employes of the respondent company did not wish to voluntarily join the union and therefore the petitioners sought to bring pressure against the employer so that the employer would in turn force or coerce its employes to become members of the union. The employer could not lawfully accede to such a request. The law of Wisconsin prohibits the employer from coercing its employes or interfering with their free choice of a collective bargaining agent. The petitioners' brief is predicated upon the proposition that because there was no physical violence they were entitled to indulge in picketing activities. They lose sight of the fact that no matter how peaceful picketing may be, if it is carried on for the purpose of coercing other employes or for the purpose of coercing an employer to violate the law, such picketing is unlawful. Very recently this court, in *National Labor Rel. Bd. vs. Virginia Elec. & P. Co.*, ... U. S. ....., 86 L. ed. 306, held that an employer may be guilty of coercion by the mere use of words and without any violence on the part of the employer. If that is true in respect to an employer it must be equally true in respect to an employe. Fortunately in this country we do not have one constitutional guarantee of freedom of speech for an employer and an entirely different one for an employe. In the above case, Justice Murphy writing the opinion of the court, declared:

> "But certainly conduct, though evidenced in part by speech, may amount in connection with other circumstances to coercion within the meaning of the Act. If the total activities of an employer restrain

or coerce his employees in their free choice, then those employees are entitled to the protection of the Act. And in determining whether a course of conduct amounts to restraint or coercion, pressure exerted vocally by the employer may no more be disregarded than pressure exerted in other ways. For 'Slight suggestions as to the employer's choice between unions may have telling effect among men who know the consequences of incurring that employer's strong displeasure'.

* * * * * *

"The mere fact that language merges into a course of conduct does not put that whole course without the range of otherwise applicable administrative power. In determining whether the Company actually interfered with, restrained, and coerced its employees the Board has a right to look at what the Company has said as well as what it has done. (pp. 310, 311)

* * * * * *

"Perhaps the purport of these utterances may be altered by imponderable subtleties at work which it is not our function to appraise. Whether there are sufficient findings and evidence of interference, restraint, coercion, and domination without reference to the bulletin and the speeches, or whether the whole course of conduct evidenced in part by the utterances was aimed at achieving objectives forbidden by the Act, are questions for the Board to decide upon the evidence." (p. 312)

When the petitioners admit that it is their object to attempt to take from the employes the means of earning a livelihood in an effort to force them to join the union,

they thereby admit that they are indulging in illegal activities. They are also engaging in illegal activities when they apply economic pressure to the employer for the purpose of compelling the employer to persuade its employes to join the union.

The fact that picketing may be peaceful does not imply that it is not coercive. Here the petitioners have frankly admitted that their aim is not merely to advertise the employes; on the contrary it is their aim to make it impossible for the employes to earn a living. To attempt to take a man's livelihood away from him is to attempt to apply economic pressure and thereby coerce him.

The language of this court in *Gompers vs. Buck's Stove & Range Company,* 221 U. S. 418, 55 L. ed. 797, has a special signficance at this time when applied to the legislative enactment under consideration. The court there declared:

> "Society itself is an organization, and does not object to organizations for social, religious, business, and all legal purposes. The law, therefore, recognizes the right of workingmen to unite and to invite others to join their ranks, thereby making available the strength, influence, and power that come from such association. By virtue of this right, powerful labor unions have been organized.
>
> But the very fact that it is lawful to form these bodies, with multitudes of members, means that they have thereby acquired a vast power, in the presence of which the individual may be helpless. This power, when unlawfully used against one, cannot be met, except by his purchasing peace at the cost of submitting to terms which involve the sacrifice of rights protected by the Constitution; or by standing on such rights, and appealing to the preventive powers of a court of equity. When such appeal is made, it

is the duty of a government to protect the one against the many, as well as the many against the one.

In the case of an unlawful conspiracy, the agreement to act in concert when the signal is published gives the words 'Unfair,' 'We Don't Patronize,' or similar expressions, a force not inhering in the words themselves, and therefore *exceeding any possible right of speech which a single individual might have.* Under such circumstances they became what have been called 'verbal acts,' and as much subject to injunction as the use of any other force whereby property is unlawfully damaged. When the facts in such cases warrant it, a court having jurisdiction of the parties and subject-matter has power to grant an injunction." (Italics supplied)

It is well to bear in mind the activities which section 111.06 (2) prohibits members of labor unions from indulging in are not dependent upon any definition of "labor dispute" as set forth in the statutes. Members of a labor union have no right to coerce an employe whether there is or is not a labor dispute in existence. Likewise, an employer has no right to coerce his employes whether there is or is not a labor dispute in existence. The conduct of the petitioning unions and their members in attempting to "hit the pocketbooks" of the employes is so clearly coercive as to make it difficult to add anything by way of argument.

Would an employer be guilty of coercion if he threatened to reduce the compensation of his employes if they failed to join a labor union? Section 111.04 guarantees to the employe the right to refrain from joining a labor union if he so desires. Obviously, if it would be coercive for an employer to indulge in such a practice, it is equally coercive for a labor union to indulge in similar activities.

The Employment Peace Act is a comprehensive enactment. It is apparent that it was drafted with great care and deliberation. The draftsmen specifically set forth in detail the acts which constitute unfair labor practices. The Act is not composed of sweeping and general declarations.

This court did not have before it such a carefully drawn enactment in any of the cases relied upon by petitioners. The effect of the recent decisions was fully explained by the court in an opinion written by Mr. Justice Frankfurter in *Milk Wagon Drivers Union vs. Meadowmoor Dairies,* 312 U. S. 287, 85 L. ed. 836, as follows:

> "We do not qualify the Thornhill and Carlson decisions. We reaffirm them. They involved statutes baldly forbidding all picketing near an employer's place of business. Entanglement with violence was expressly out of those cases. The statutes had to be dealt with on their face, and therefore we struck them down. Such an unlimited ban on free communication declared as the law of a state by a state court enjoys no greater protection here. Cantwell vs. Connecticut, 310 U. S. 296, 84 L. Ed. 1213, 60 S. Ct. 900, 128 A. L. R. 1352; American Federation of Labor vs. Swing, No. 56 this term, this day decided (..... U. S. ....., post, 513, 61 S. Ct. .....). But just as a state through its legislature may deal with specific circumstances menacing the peace by an appropriately drawn act, Thornhill vs. Alabama, 310 U. S. 88, 84 L. Ed. 1093, 60 S. Ct. 736, supra, so the law of a state may be fitted to a concrete situation through the authority given by the state to its courts. This is precisely the kind of situation which the Thornhill opinion excluded from its scope. 'We are not now concerned with picketing en masse or otherwise conducted which might occasion such

> imminent and aggravated danger * * * as to justify a statute narrowly drawn to cover the precise situation giving rise to the danger.' 310 U. S. 105, 84 L. Ed. 1104, 60 S. Ct. 736. We would not strike down a statute which authorized the courts of Illinois to prohibit picketing when they should find that violence had given to the picketing a coercive effect whereby it would operate destructively as force and intimidation. Such a situation is presented by this record. It distorts the meaning of things to generalize the terms of an injunction derived from and directed towards violent misconduct as though it were an abstract prohibition of all picketing wholly unrelated to the violence involved."

The petitioners' brief in the present case constitutes a distortion of the decision and findings of the learned trial judge. The trial court did not conclude that the Employment Peace Act makes illegal all "peaceful picketing". It merely concluded that "peaceful picketing" carried on pursuant to a preconceived plan for the purpose of compelling an employer to violate the law, constitutes unlawful conduct on the part of a labor union.

The truthfulness of the words printed or uttered is not the test to determine the legality of the acts of the speakers. If the words are printed or uttered pursuant to a preconceived plan entered into by two or more persons for the purpose of accomplishing an illegal object, the fact that the words are true does not constitute a legal justification for their use.

V.

The findings of the trial court are supported by the great weight of the evidence.

In the seventh paragraph of the trial court's findings of fact the court expressly found:

"(1) That the defendants herein have, in concert with others as well as individually, contrary to the provisions of Section 111.06, Wisconsin Statutes, coerced and intimidated the employes of the plaintiff in the enjoyment of their legal rights, including those guaranteed in Section 111.04, Wisconsin Statutes, and have, by such coercion and intimidation, injured said employes in their property by such means.

(2) That the defendants have, individually and in concert with others, by exerting economic pressure upon plaintiff's employes as well as upon customers of the plaintiff solicited by such employes, intended to coerce, intimidate and induce the plaintiff employer to interfere with its employes in the enjoyment of their legal rights, including those guaranteed in Section 111.04, Wisconsin Statutes.

(3) That the defendants have thereby injured the plaintiff in its trade and business for the purpose of compelling the plaintiff to influence and coerce its said employes to designate the defendants Bakery Sales Drivers Local Union No. 344 (A. F. of L.), or Auto Truck Drivers Joint Council No. 50 (A. F. of L.), as a collective bargaining representative for such employes.

(4) That the defendants, by their conduct as individuals, as well as in concert with others in this

regard, have intended to and have in fact injured the plaintiff in its trade and business." (R. 26, 27)

To take the daily bread from the mouths of a workingman and his family as a means of forcing him to join a labor organization is certainly coercive conduct.

The petitioners have admitted that their aim was to make it difficult for the respondent's employes to earn a livelihood. Throughout the history of the common-law the matter of intent has played a significant part in determining whether acts are lawful or unlawful. The difference between murder and justifiable homicide depends upon the intent of the actor. The performance of an act not accompanied or prompted by an evil intent may be entirely innocent and lawful. On the other hand, if the act arises from an evil intent, it may be unlawful. We must examine the qualities of the mind of the actor to determine whether an act is legal or illegal. Peaceful picketing is no different than any other act. If it is carried on in concert to achieve a legitimate purpose it is lawful. On the other hand, if it is used as a means to achieve an illegitimate purpose, it is unlawful.

The history of the controversy between the respondent and the petitioners clearly discloses that from the beginning the petitioners have sought to force the respondent to compel its employes to join the petitioning union. The contract which the petitioners demanded of the respondent in December, 1938, required the respondent to discharge any employe who refused to join the union. Petitioner Johnson, business manager for Local 344, admitted upon the trial that at a meeting with the Carpenter Baking Company executives early in January of 1939, the union attorneys informed the company that the union "had no grievance against the company at all" (R. 70). Only a few days after

this assertion the petitioning unions placed pickets about respondent's plant, carrying signs stating that the respondent was "Unfair to Organized Labor".

At the time the petitioning unions made the demand for a closed shop there was not a single employe of the Carpenter Baking Company who belonged to such unions. The conference between Mr. McCully, vice-president of the Carpenter Baking Company and petitioner Johnson, which was held on April 30, 1940 at the request of Mr. Johnson, clearly proves that the activities of the petitioners were not aimed solely at the employes. Mr. Johnson, business manager for the union, informed Mr. McCully:

> "I am going to start and picket your bakery."

He further stated:

> "We will put a campaign against you." (Exhibit "F" in lower court; R. 81-84.)

Furthermore, the fact that the union followed and picketed the employe Hoff at a time when he was already a member of an affiliate which he joined while in the employ of Carpenter Baking Company also tends to disclose that the union was aiming at the employer. Hoff's application for membership in the affiliate union was taken by Roland Tounier, one of respondent's employes and a member of Local 344 (R. 78). Petitioner Elmer Johnson and other representatives of the union had numerous meetings with the employes of the respondent. The evidence shows that the respondent company cooperated with the petitioning unions in arranging these meetings so that representatives from the unions could address the employes (R. 70). If the employes refused to join the union after having had the alleged benefits of the union personally explained to them, are we to assume that when the union commenced its picketing activities

it was doing so without the intent to injure the respondent and its employes?

The trial court occupied a better position than this court and the Wisconsin Supreme Court to pass upon the truthfulness of the testimony given by the various witnesses on the trial. The trial court had the opportunity to personally see and hear the witnesses. This court has, and the Wisconsin Supreme Court had, nothing but the cold, written record before it.

It has been repeatedly held that the purpose or intent with which acts are performed is to be determined by all of the surrounding facts and circumstances. We submit that there is abundant evidence to sustain the trial court's finding that the petitioning unions were coercing the respondent as well as the respondent's employes.

VI.

The injunction as entered in the trial court is of a limited nature.

It Relates to Acts That Are Wilful and Intentional.

Petitioners claim that the injunction is too broad and sweeping; that if literally carried out it will restrain and enjoin them from activities that are innocent in and of themselves.

As heretofore stated, the court found that the petitioners were carrying on their activities for an illegal purpose. Peaceful picketing, when carried on for a proper purpose, is lawful. Likewise, other activities when carried on for a proper purpose might be lawful. However, when it appears that acts innocent in and of themselves are being performed to achieve an illegal objective, it is entirely proper that such acts be enjoined when an employer against whom they are directed is sustaining an irreparable injury by reason thereof.

The petitioners have set about to destroy the respondent's property. Its property consists of its business. Every day that the petitioners engage in their unlawful activities they are destroying the respondent's property. At the time of the trial it was estimated that respondent had already lost fifteen per cent of its total volume of business. That does not represent its entire loss. The loss is progressive. The destruction of respondent's property has continued every day since the trial. The destruction of this property has been accomplished in part by acts that in and of themselves may seem innocent and harmless. However, when we view the objective of the petitioners, it is quite apparent that they have no lawful right to engage in such activities. The provisions of the judgment are necessarily broad. That is true because the petitioners' objective is an improper one. As already stated, when the objective is improper, an employer is entitled to enjoin acts that might otherwise be innocent and harmless.

It is important to note that the injunction as entered in general prohibits only such activities as are intentionally carried on for the purpose of injuring the respondent or its employes. Throughout the injunction we find that it deals with intentional acts only. For example, paragraph (1) of the injunction is limited to "conduct *intended* and reasonably calculated to coerce and intimidate plaintiff's (respondent) employes" (R. 32). Paragraph (2) prohibits the petitioners from following respondent's delivery trucks while they are being used to deliver bakery products to respondent's customers. The evidence clearly shows that such activities have resulted in serious traffic hazards and certainly the court acted properly in prohibiting conduct which is reasonably calculated to endanger the lives of persons using the public streets. Paragraph (3) of the injunction enjoins the petitioners from "inciting or attempting to

persuade persons not to deal with the plaintiff or the plaintiff's employes or with retail dealers offering plaintiff's products for sale". The trial court found that petitioners were attempting to coerce respondent to violate the law. A part of its plan of coercion was to induce customers not to trade with respondent. When the trial court found that the illegal objective existed certainly it could not properly avoid entering the injunction that it did. Paragraph (4) of the injunction is limited to "intentionally molesting, injuring or interfering with the plaintiff in its busness". If the molesting, injuring or interfering is not intentional it is not prohibited.

VII.

It is immaterial whether the activities of the petitioners were directed against the respondent or against the employes of the respondent.

The petitioners claim that their activities were directed against the employes of the respondent and not against the respondent. We contend the record does not bear out this contention. However, if petitioners' contentions are correct in this regard, it could not properly change the result. The respondent has a legal interest in the services rendered to it by its employes. It has a legal right to have its employes free from coercion in respect to the services they perform.

The "Employment Peace Act" (Sec. 111.01, Wisconsin Statutes) expressly provides:

> "It is also recognized that whatever may be the rights of disputants with respect to each other in any controversy regarding employment relations, they should not be permitted, in the conduct of their controversy, to intrude directly into the primary rights

of third parties to earn a livelihood, transact business and engage in the ordinary affairs of life by any lawful means and free from molestation, interference, restraint or coercion."

The common law has long recognized that an employer may maintain an action against a wrongdoer in respect to damages sustained by him as the result of an injury to his employe. 35 *Am. Jur.* 958, 39 *C. J.* 1369.

To permit the union to coerce respondent's employes in violation of law is to permit them to intrude "into the primary rights" of the respondent, contrary to the statute.

CONCLUSION.

At the time judgment was entered in this case in the trial court, Local No. 344 was not the "sole collective bargaining agent" for respondent's employes. Since the judgment has been entered it has become and now is "the sole collective bargaining agent" for all of respondent's employes. The respondent has recognized it as such by entering into a formal written contract with the union wherein it is expressly stated that the employer recognized Local No. 344 as "the sole collective bargaining agent," and it still recognizes it as such sole collective bargaining agent. If a legitimate labor dispute hereafter arises between Local No. 344 and the respondent, Local No. 344 has it within its power to engage in picketing or to call a strike. The principal issue presented for determination in petitioners' brief is now a moot question. The writ should be denied.

Respectfully submitted,

VAN B. WAKE,
Attorney for Respondent,
773 North Broadway,
Milwaukee, Wisconsin.

MARTIN R. PAULSEN,
Of Counsel.

Appendix A.

No. 844

SUPREME COURT OF THE UNITED STATES

October Term, 1941.

BAKERY SALES DRIVERS LOCAL UNION No. 344 (A. F. of L.), AUTO TRUCK DRIVERS JOINT COUNCIL No. 50 (A. F. of L.), ELMER JOHNSON, JOSEPH REICHARTZ, GILBERT SCHLECHTA and G. McMICKEN,

Petitioners,

vs.

CARPENTER BAKING COMPANY, a Corporation,

Respondent.

State of Wisconsin, }
Milwaukee County. } ss.

M. H. Carpenter being first duly sworn on oath deposes and says: that he is secretary-treasurer of the Carpenter Baking Company, respondent in the above entitled action; that the trial of the issues in said action was had on the 22nd, 23rd, 24th and 25th days of September, 1940; that the judgment of the trial court was entered in said action on the 16th day of December, 1940;

That at the time of said trial and the entry of said judgment respondent had twenty-eight employes eligible for

membership in Bakery Sales Drivers Local Union No. 344; that of said twenty-eight, eight of respondent's employes belonged to said union; that subsequent to said trial and entry of judgment other employes of respondent became members of said union and on the 8th day of April, 1941, respondent recognized that a majority of its said employes were members of said union and on said 8th day of April, 1941 a formal contract was entered into between said union and the respondent, a copy of which contract is annexed hereto, marked Exhibit "A" and made a part hereof. That under the terms of said contract respondent recognized said union as "the sole collective bargaining agent for all truck drivers in its employ".

Affiant further avers that on or about the 5th day of November, 1941, respondent received from the Regional Director of the National Labor Relations Board in the City of Milwaukee, Wisconsin, a letter making inquiry concerning the relationship between respondent and said union; that on the 11th day of November, 1941, on behalf of respondent, a letter was addressed to said Regional Director of the National Labor Relations Board reading in part as follows:

> "* * * In response to the inquiry contained in your letter we wish to advise you as follows:
>
> On the first day of April, 1941, a contract was entered into between Carpenter Baking Company as employer and the I. B. of T. C. W. & H. of A. Bakery Sales Drivers Local No. 344. The contract is not a so-called closed shop contract; however, it expressly provides that the employer recognizes the Union as the sole collective bargaining agent for all truck drivers in its employ during the term of the contract. The contract further provides that 'This agreement shall become effective upon signing and shall remain in full force and effect to November 1, 1941'.

Since the signing of the contract the Carpenter Baking Company has at all times recognized and still recognizes Bakery Sales Drivers Local No. 344 (A. F. of L.) as the sole collective bargaining agent for truck drivers in the employ of the Company. The Company stands ready and willing to negotiate with this Union at all times and upon all subjects that are a proper matter for negotiation."

That on the 9th day of December, 1941, the Regional Director of the National Labor Relations Board forwarded a letter in response to the foregoing letter, wherein he declared:

"This is to advise you that the question of representation raised by the petition in the above matter has been adjusted".

Affiant further avers that respondent still recognizes Bakery Sales Drivers Local Union No. 344 "as the sole collective bargaining agent for all truck drivers in its employ" and it stands ready and willing to negotiate with said union at all times concerning the employment relations between respondent and its said employes.

Affiant further avers that this affidavit is made for the purpose of establishing that the principal issue as stated in petitioners' brief is now a moot question.

....(signed) M. H. CARPENTER. .....

Subscribed and sworn to before me
this ....28th.... dayof January, 1942.

....(signed) CATHERINE L. CASEY ,....

Notary Public, Milwaukee County, Wisconsin.
My commission expires ....Sept. 24, 1944. ....

(Notarial Seal)

Exhibit "A".

AGREEMENT.

Bakery Sales Drivers Local No. 344

Wholesale

This Agreement made and entered into this 8th day of April, 1941, by and between *Carpenter Baking Company,* hereinafter referred to as the Employer, and the I. B. of T. C. W. & H. of A., *Bakery Sales Drivers Local No. 344* of Milwaukee, Wisconsin, hereinafter referred to as the Union.

WITNESSETH

Whereas both parties are desirous of preventing strikes and lockouts and to maintain a uniform minimum scale of wages, working hours, and conditions among the members of the Union, and concerns, individuals, and corporations hiring and employing truck drivers and helpers, and to facilitate a peaceful adjustment of all grievances and disputes which may arise from time to time between the Employer and his individual employees in the occupation above-described, the following conditions are set forth:

Article I.

The Employer recognizes the Union as the sole collective bargaining agent for all truck drivers in its employ during the term of this contract.

The Union agrees to accept all such new and old employees into membership upon the same terms and conditions as govern the admission of others to such membership.

Article II.

The Employer agrees not to discharge any employee because of union activities, or without just cause, and agrees to reinstate any employee in accordance with the terms for settling any disputes between the Employer and the Union as herinafter provided.

(Articles III to XXII inclusive of the contract are not printed at length in this brief for the reason that they are not material to the issues before the court.)

Article XXIII.

This agreement shall become effective upon signing and shall remain in full force and effect to November 1, 1941.

Employer: **Union:**

BAKERY SALES DRIVERS #344

CARPENTER BAKING CO. **Per**

Per T. E. McCully ELMER JOHNSON — sec'y

V.P.

(SEAL)

FILED
FEB 12 1942
CHARLES ELMORE CROPLEY

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 844

BAKERY SALES DRIVERS LOCAL UNION NO. 344 (A. F. OF L.), AUTO TRUCK DRIVERS JOINT COUNCIL NO. 50 (A. F. OF L.), ELMER JOHNSON, JOSEPH REICHARTZ, GILBERT SCHLECHTA AND G. McMICKEN,

Petitioners,

vs.

CARPENTER BAKING COMPANY, A CORPORATION.

Respondent.

REPLY BRIEF.

JOSEPH A. PADWAY AND
A. G. GOLDBERG,
Attorneys for Petitioners.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 844

BAKERY SALES DRIVERS LOCAL UNION NO. 344 (A. F. OF L.), AUTO TRUCK DRIVERS JOINT COUNCIL NO. 50 (A. F. OF L.), ELMER JOHNSON, JOSEPH REICHARTZ, GILBERT SCHLECHTA AND G. McMICKEN,

Petitioners,

vs.

CARPENTER BAKING COMPANY, A CORPORATION.

Respondent.

REPLY BRIEF.

The respondent has filed a brief opposing the issuance of a writ of certiorari in the above entitled matter basing its opposition to the granting of the writ on the following grounds: (1) The principal question has become moot; (2) the concerted activities of the petitioners were engaged in to achieve an unlawful object.

Because both of such arguments represent an effort to inject new and unwarranted issues into the case, petitioners have deemed it necessary to make brief reply thereto.

However, before discussing those issues we wish to comment on the argument found at pages 10 through 12 of re-

spondent's brief. It is there asserted that the action of the Wisconsin Legislature in passing the present Chapter 111, Stats. 1939, was induced by request of employers and *employees* alike, and as a result of a claimed abuse of privileges granted and protection afforded by other state laws. We do not wish to honor such palpably baseless argument by making extended answer thereto. We wish only to point out the circumstances under which some employees requested such legislation, as found by the National Labor Relations Board:

> "Shortly before the Catlin Bill was called up for committee hearing, the sales drivers were assembled by Sales Manager Pierce and told they were going to Madison. Pierce, two supervisors, and Winkel arranged transportation for all. Winkel, Hesselbach, and Francis Cantine, a sales driver, were requested by M. H. Carpenter to prepare speeches for delivery before the committee and each submitted a draft to Carpenter for correction before having it typed in the respondents' office. However, Cantine was the only sales driver who spoke. M. H. Carpenter addressed the committee and declared, among other things, that if the Catlin Bill was not passed 'he would spend the rest of his life defeating labor.'
>
> "At no time during the exercise of 'economic pressure' was the picketing by the A. F. of L. anything but peaceful and orderly. Carpenter's statements were clearly calculated to leave an erroneous impression of the aims of the A. F. of L. with his listeners. We conclude that the events participated in by the respondents in which they required the sales drivers to take part, were acts of interference, not only in the rights of the employees to self-organization, but also interference and domination in the administration of the Brotherhood.
>
> "The Catlin Act became the law of the State of Wisconsin on or about March 30, 1939. The plant re-

opened on April 4, 1939, free from the 'economic pressure' of the Union.'' [1]

So much then for the argument that this vicious one-sided labor legislation, designed to thwart the right of self-organization, resulted from the pleas of employees as well as employers to free them from "the tyranny of the multitude".

This legislation reflects rather the tyranny of the Legislature which, representing the group in power, imposes "penal sanctions on peaceful and truthful discussion of matters of public interest merely on a showing that others may thereby be persuaded to take action inconsistent with its interests". (*Thornhill* v. *Alabama*, 310 U. S. 88; 60 Sup. Ct. 736.)

I.

No Issue in the Case Has Become Moot.

At the outset we observe the revealing fact that respondent did not seek to preclude an appeal by the State Supreme Court on the ground that the principal question was moot. The contract upon which it relies in support of its contention was executed on April 1, 1941. The Supreme Court of Wisconsin did not render its decision until June 25, 1941, almost three months after the contract was entered into. If the case be moot now, then obviously it was moot before the Supreme Court of Wisconsin decided the appeal. We think it fair to conclude that the respondent does not seriously believe that the case or any issue raised by it

[1] Excerpt from decision and order of the National Labor Relations Board, dated January 16, 1941, in Case No. C-1664 entitled "In the Matter of *Carpenter Baking Company*, a Corporation, *Michael Carpenter Company*, a Corporation, *M. Carpenter Baking Company*, a Corporation, *Joseph J. Carpenter*, individually, *Joseph M. Carpenter*, individually, and *M. H. Carpenter*, individually, and *Auto Truck Drivers Joint Council No. 50* (A. F. of L.)".

is moot. It is merely seeking, somewhat frantically, to seize on any beclouding issue that comes to mind, no matter how unfounded or how irrelevant, in order to deny petitioners an opportunity to have this Honorable Court protect their constitutional rights.

In any event, respondent's argument is completely without merit. It is entirely premised upon an assumption which is wholly at variance with the stipulation and with the conclusions of the court below. That assumption is that the controversy that resulted in the litigation and injunction was between the union and the employer over certain questions that were subsequently settled by the agreement of April 1, 1941. Nothing is further from the truth.

We have abundantly shown in our main brief in support of the petition for the writ (pp. 38-43) that the dispute was between employees or competing labor unions and not between petitioning union and the respondent. Petitioners have sought, and still seek, to have all of respondent's employees become members of the union. The dispute was and is between the union and those of respondent's employees who refuse to join the union. This is pointedly established by the fact that employees of the company who were not members of the union were not picketed (R. 27). The company was not picketed. The union picketed only those employees who failed or refused to become its members.

The contract of April, 1941, did not terminate that dispute. It could not. Under the Wisconsin Statutes a closed shop is unlawful unless seventy-five per cent of the employees desire the same. The union has still not succeeded in inducing seventy-five per cent, much less one hundred per cent, of the respondent's employees to become its members. Petitioners are as anxious today as they were before the injunction was issued in the court below to engage in lawful activities to induce all of re-

spondent's employees to join the union. (See Affidavit annexed hereto as Appendix "A".) The same controversy that preceded the injunction still persists and has not been terminated or even affected by the contract of April, 1941.

If the decree of the court below were set aside, and, as we contend, it should be set aside because it deprives petitioners of constitutional rights, then the same activities that petitioners formerly engaged in would be immediately resumed. It is clear, therefore, that the case is not moot and that a decision by this Honorable Court favorable to petitioners would not be a decision on an academic question but would result in desired and effectual relief to petitioners.

II.

There is no evidence which would support a finding that petitioners engaged in concerted activities to attain an unlawful objective, nor was there any such finding by the court below.

In petitioners' brief in support of the petition for certiorari, it is pointed out that the Circuit Court for Milwaukee County made express findings of fact with respect to the objectives of the union, all of which findings clearly demonstrate that the object of the union was to induce the sales drivers of the company to join Local 344 (Brief, pp. 41-43. R. 35-54). There is, therefore, no basis for respondent's argument at pages 17 through 28 of respondent's brief that the concerted activities of the employees was for the purpose of compelling the employer to violate any provision of law.

It can be seen from the stipulated facts that on only one occasion did petitioners demand that the respondent sign an all-union agreement (R. 36-37). This was in December, 1938, before the passage of Chapter 111, laws of 1939, and such agreement was valid under the then existing laws. (*United Shoe Workers, etc.* v. *Wisconsin Labor Relations*

Board, 227 Wis. 569, 279 N. W. 37; *American Furniture Co. v. I. B. of T. C. S. & H.,* 222 Wis. 338, 268 N. W. 250.)

At no time after that, and particularly at no time after the passage of Chapter 111 in May of 1939, did the petitioners make any request upon the company to sign an agreement prohibited by State law. The court below found expressly that all subsequent activities were for the purpose of persuading the non-union employees to join the union.

It is not the contention of the petitioners in the instant case that peaceful picketing is not subject to restraint regardless of the object which such activities are designed to achieve. It is not necessary to discuss that proposition of law in the instant case. There is nothing about the objectives sought by the union—unionization of the employees of the employer by direct appeal to the public, and by the public designation of the non-union status of such employees—which is forbidden by either State or national law or which could validly be forbidden. Petitioners do not seek in the instant case to compel the employer to violate any law. Rather do petitioners seek in the instant case to put themselves in a position which will permit the employer to sign an all-union agreement with it without violating any law. That is the sole object of the petitioners.

We hardly think it necessary to comment elaborately upon the suggestion that what is here involved is an effort by a State legislature to prevent coercion of employees by labor unions or others. The fact is, as conclusively found by the Circuit Court of Milwaukee County (R. 26-27), that petitioners engaged in peaceful, truthful and nonviolent picketing activities. This concrete conduct and not vague abstractions like "coercion" or "intimidation" has been enjoined. It is self-evident that constitutional freedoms and rights cannot be circumvented or vitiated by meaningless name-calling.

Certainly, if such distortion of the law is to be upheld then the statement in the *Senn* case, the *Thornhill* case, the *Carlson* case, the *Swing* case, and the *Meadowmoor* case, that picketing is merely an exercise of the right of free speech, the workingman's means of communication, means nothing at all.

Conclusion.

It becomes increasingly important that this Honorable Court render an opinion which will meet the new cry of "illegality of purpose" which has now been raised by employers in an effort to avoid the salutary principles announced in the *Thornhill, Carlson* and *Swing* cases. The instant case affords such opportunity. In the instant case, we have a holding of a state court that the resultant injury from peaceful picketing activities constitutes the standard for the purpose of determining the legality or illegality of the objectives as well as the legality or illegality of the means. It is a standard which has been recently rejected by this Court in the *Senn, Thornhill* and *Swing* cases in which it was pointed out that resultant damages from the exercise of the right of free speech for a legitimate purpose is *damnum absque injuria,* and does not constitute the measure for ascertaining the legality of purposed means.

It also becomes increasingly important that this Honorable Court make it clear to lower courts and to state legislatures that the device of applying opprobrious epithets, such as "coercion" and "intimidation", to the peaceful exercise of rights guaranteed by the Constitution must be abandoned, and the right to freedom of speech must remain inviolate.

Respectfully submitted,

JOSEPH A. PADWAY and
A. G. GOLDBERG,
Attorneys for Petitioners.

APPENDIX A.

SUPREME COURT OF THE UNITED STATES.

October Term, 1941.

No. 844.

BAKERY SALES DRIVERS LOCAL UNION No. 344 (A. F. of L.), Auto Truck Drivers Joint Council No. 50 (A. F. of L.), Elmer Johnson, Joseph Reichartz, Gilbert Schlechta and G. McMicken, *Petitioners,*

vs.

CARPENTER BAKING COMPANY, a Corporation, *Respondent.*

STATE OF WISCONSIN,
Milwaukee County, ss:

Elmer Johnson, being first duly sworn, on oath, deposes and says that he is one of the petitioners above named; that he is also the Business Representative of the above entitled petitioner, Bakery Sales Drivers' Local Union No. 344 (A. F. of L.); and is duly authorized to make this affidavit on its behalf; that such affidavit is made for the purpose of meeting the affidavit heretofore filed by M. H. Carpenter on behalf of the Carpenter Baking Company, respondent, which affidavit was made in support of the contention that the principal issue in the instant cause has become moot;

Affiant further avers that the peaceful picketing activities of the petitioners were discontinued upon the affirmance by the Supreme Court of the State of Wisconsin of the judgment of the Circuit Court for Milwaukee County restraining such activities; that such activities had been directed to the employees of the Carpenter Baking Company for the purpose of advising the public of the non-union status of such employees, and for the purpose of persuading such employees to join and become members of Bakery Sales Drivers' Local Union No. 344 (A. F. of L.);

that it was hoped by such activities to acquire a sufficient number of members among the employees of the Carpenter Baking Company, so that Local Union No. 344 would then be in a position to request the Carpenter Baking Company to enter into an all-union agreement with it after first complying with the terms of Section 111.06(1)(c) Wisconsin Statutes, which provides among other things "that an employer shall not be prohibited from entering into an all-union agreement with the representatives of his employees in a collective bargaining unit, where three-fourths or more of the employees in such collective bargaining unit shall have voted affirmatively by secret ballot in favor of such all-union agreement in a referendum conducted by the Board.";

Affiant further avers that the ultimate aim and purpose of Local 344 to enter into an all-union agreement has not been abandoned; that the collective bargaining agreement entered into between the Carpenter Baking Company and Local No. 344 as set forth in the affidavit of M. H. Carpenter does not contain an all-union agreement because such agreement is prohibited by the afore referred to Section of the Wisconsin Statutes; that unless and until the judgment of the Wisconsin Supreme Court is reversed, and Local 344 is permitted to engage in peaceful picketing activities for the purpose of acquiring more members among the employees of the Carpenter Baking Company, Local 344 will be deprived of a substantial right in the achievement of its ultimate goal;

Affiant further avers that the collective bargaining agreement referred to in the affidavit of M. H. Carpenter did by its very terms expire on November 1, 1941, and that no new agreement has been entered into since that date, so that there is not now in existence a collective bargaining agreement between the Carpenter Baking Company and Local 344; that Local 344 is desirous of continuing its peaceful picketing activities to the end that it may enter into a contract with the Carpenter Baking Company containing the same terms and provisions contained in the contracts that are now in existence between Local 344 and all other major baking companies in the Milwaukee area, with the excep-

tion of the Carpenter Baking Company, such contracts containing such all-union agreement.

ELMER JOHNSON.

Subscribed and sworn to before me this 5th day of February, 1942.

DAVID PREVANT,
Notary Public, Milwaukee County, Wisconsin.

My commission expires May 10, A. D. 1942.

(8770)